89-1834

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1990

D.T., a minor, by his legally appointed guardians;
M.T. and K.T. as parents and legal guardians of D.T.;
F.H., Jr., a minor, by his legally appointed guardians;
F.H. and L.H., as parents and legal guardians of F.H., Jr.,;
P.M., a minor, by his legally appointed guardian;
R.T., as parent and legal guardian of P.M.,

Petitioners

vs.

INDEPENDENT SCHOOL DISTRICT NO. 16
of Pawnee County, Oklahoma,

Respondents

On Writ of Certiorari
to the United States Court of
Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether placing a felon-teacher with defenseless students with notice and resultant abuse, is the affirmative abuse of government power triggering the substantive component of the Due Process Clause?

2. Whether bonding a felon-teacher with defenseless students, if not an affirmative abuse of power, has critical significance in determing state action by the school district?

3. Whether a municipality is vicarious from causation solely because the policy pursued never contemplated abuse to children, and excused from fault solely because the municipality responded to substantial notice with good faith discretion by the final policymakers?

LIST OF PARTIES

The parties before this Court are petitioners Michael Tilley and Kay Tilley, natural parents of Daniel Tilley, a minor child; Floyd Hightower and Linda Hightower, natural parents of Floyd Hightower, Jr., a minor child; Rebecca Taylor, natural mother of Paul Miller, a minor child.

Respondents before this Court are Independent School District 16 of Pawnee County, Oklahoma, include the following members of the School Board: Joseph Cole, Matthew Ringgold, Alan Potter, John Giddens and Donald Topping.

The parties to the proceedings on appeal to the United States Court of Appeals for the Tenth Circuit filed August 1988, are the same as herein.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following are the constitutional provisions and statutes involved in this appeal:

A. Constitutional Provisions

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States under the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunitites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment 14. Section 1.

B. Federal Statutes

Every person who, under color of any statue, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for regress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. Section 1983

OPINION BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is reported at 894 F.2d 1176 and is printed in the Appendix hereto, page 1a.

Said Opinion addressed the merits on appeal in Case No. 88-1619. Cases 89-5037 and 89-5077 also listed are mute in that they were appeals of district court orders awarding interim attorney fees to petitioners upon posting of supercedeas bond. Since the United States Court of Appeals for the Tenth Circuit reversed, the issue was not addressed in the opinion. Said bond has been executed and monies returned to respondent.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on January 25, 1990, reversing Petitioners verdict below. On April 6, 1990, Justice White signed an order extending the time for filing this petition for certiorari to and including May 25, 1990.

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATEMENT OF CASE

Invoking federal jurisdiction under 42 U.S.C. § 1983, suit was brought in the Northern District of Oklahoma in March of 1985, Case No. 85-C-206E. Petitioners are the natural parents of school children ("children") ages 11, 11, and 13 respectively, at the time of deprivation. Respondents ("school district") are empowered under state law to administer to the educational needs of petitioners in a rural Oklahoma setting.

The facts material to the consideration of the questions presented are as follows. On August 11, 1981, superintendent of schools for respondents, Charles Clayton, received a phone call from Mrs. Diane Kelley of Phoenix, Arizona, concerning the recent hiring of a teacher ("Epps") in the school district.

Mrs. Kelley told Clayton that Epps had just returned from a visit to her residence in Arizona the day before. She related to Clayton that she had caught Epps in the bathroom with her twelve-year-old son and later had determined that Epps had attempted to molest him.

Mrs. Kelley informed Clayton that she had contacted local police after he had gone and in turn had called her mother in Dallas, Texas, who was Epps' aunt. She detailed information that she had received from her mother that Epps had been arrested in Dallas on a sexually related charge and fired from a teaching job.

In fact, Epps had been convicted of the felony of sodomizing a 16 year-old boy in case No. C-71-9791 in Dallas County, Texas and abruptly resigned a teaching job for 1971.

Clayton took Mrs. Kelley's phone number and informed her that he would look into it.[1] Thereafter, Mrs. Kelley on two occassions telephoned Don Daniels, the principal of the school where Epps was assigned and repeated to Daniels the same warnings.

In response to Mrs. Kelley's inquiry, Clayton called Ben Lacey, the superintendent of schools of one of Epps' former employers in Drumright, Oklahoma. Mr. Lacey informed Clayton that he had heard some talk involving child abuse while Epps was employed in the district some years earlier, but nothing had come of it. (Tr-2-147) Additionally, Clayton called Glen Jones, Epps' former principal in Dallas, who in turn informed Clayton that Epps had taught there for five years beginning in 1972 and he had no knowledge of any criminal activity involving Epps.[2]

In the months that follow, a succession of complaints were brought to the attention of the policymakers concerning Epps' potential for harm.

Charlotte Johnson, a representative of some parents, approached Daniels on two occasions in 1981 and made inquiry concerning Epps' behavior with young boys. (Tr-2-217)

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1. Clayton testified at Tr-2-120 that the phone call was the most serious call he had received as a school administrator. However, he never called Mrs. Kelley back, never requested her mother's phone number, never verified the complaint with the Phoenix police or the arrest with the Dallas police.

2. Jones testified that after the phone call, but before the violations of 1984, he became aware of Epps' sodomy charge, but did not think it appropriate procedure to follow it up. Tr-4-501-504.

Debbie Hewitt, a parent, visited twice with Daniels in May of 1982. She was concerned about the unusual amount of time that Epps was spending with her son and was concerned for his safety. (Tr-3-354)

Peggy Pruitt, a member of the school board, was approached about Epps being a pedophile. Daniels received a complaint from Walter Potts, head custodian, about Epps' conduct in his previous teaching job in Drumright, Oklahoma; wherein it was claimed that Epps had left the school system because of his conduct with young boys. (Tr-2-193)

Epps was confronted only once during this period of time by Daniels after the initial phone calls from Mrs. Kelley, and denied the allegations, stating that Mrs. Kelley was just jealous of him. Respondents accepted that explanation and Daniels was instructed by Clayton to "keep an eye" on Epps.

On June 13, 1984 Epps, in the capacity as their current basketball coach, called petitioners' children and invited them on an endeavor to raise money so the players could attend basketball camp, since they were without funds. The children acquiesced to Epps' authority. Later on in the afternoon Epps instructed the children to call their parents to obtain permission to stay overnight with him. Beginning about 7:00 p.m. and lasting through the night, Epps systematically sexually abused the children.[3]

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3. The abuse included the showing of pornographic magazines, the fondling of private parts, and sleeping with all three of petitioners' children along with anal abuse of one of the children for an extended period. Respondents have at all times maintained that the deprivations are factual and tragic. Counsel was placed in the dilemma that results from this type of activity and entered into three

Respondents at trial maintained that the word "arrest" had never been used by Mrs. Kelley. Daniels denied receiving any phone calls from Mrs. Kelley although she was completely unconnected to petitioners. Arrest information was requested when hiring all school district employees except teachers.

At trial, it became evident also that the only memorialization of any of the incidents recited above was a short note that Clayton produced on the initial phone call from Mrs. Kelley. Clayton testified at Tr-2-151 that in 1981 there were not any formalized grievance procedures in which the school district recorded things of this nature. Further, no written records were available concerning any follow up to Daniels' or Clayton's investigations. Inquiries made by parents or employees of the school district all had to be reconstructed from memory. In fact, Clayton testified that after Epps' criminal convictions for the deprivations alleged in 1984, the school district implemented a formal grievance procedure of written reports

The events of June 13, 1984, were characterized by respondent as totally unrelated to the school district. Respondents admitted that notice had been sent home to the parents concerning a basketball camp that had been conducted on school property and approved at Board session May 7, 1984, but indicated that the district was only allowing the use of the facility without any involvement. Further,

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3. (Cont.)stipulations with respondents that were submitted to the jury outlining the violations of the children's liberty interest. On medical advice of the children's therapist and because of the age factor, testimony was not received at trial concerning abuse. The modest damage award totaling $134,000.00 reflects a balancing of interests.

notices had been sent home from the Terlton School concerning a basketball game between the parents and the students conducted in May 1984 at the school, in order to raise money for children to attend basketball camp during the summer.

The parents testified at trial that when they were approached by the children concerning the endeavor on June 13, 1984, it was apparent to them that it was related to school activities and their children's participation with Epps as their basketball coach. In fact, with all the evidence before them, it was clear that with the notices sent home from school and camps being held on school property, the release of the children was for the purpose of a school-related function.

FINDINGS BELOW

At directed verdict, the district court, (Ellison, J.) concluded at Tr-3-434 that "It's my opinion the jury could conclude, after evaluating all the evidence in this case, that the type of investigation conducted by the school district was totally inadequate and could rise to the level of reckless disregard or deliberate indifference. And that matter should be addressed by the jury."

With the mandate of this Court in *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) controlling, the district court properly instructed as to causation, single incident, policy and burden of proof. At Tr-3-435 the district court observed, "Under all of this evidence, it would appear to this Court that the issue of whether a school board is compelled to go to great extremes in investigating a teacher where they are put on notice of possibilities of a pedophile being placed as a teacher and coach of a fifth grade basketball team, I think calls

for greater action than was taken here. I'm not a member of the jury, that will be for the jury to address under proper instructions. I have aready advised them that this is not a negligence case, that it's a civil rights case. And I suggest §1983 was dr wn to address cases such as this, and this is the Court's view and ruling."

The issue of State action had been previously ruled by Summary Judgment motions with the district court finding a sufficient nexus to the school district in the basketball flyers, notices and ratification of the board's use of their facilities; along with the State's act of placing Epps in the classroom and gym with the children.

The Circuit opinion below took a different view of the evidence concluding that fault and causation were lacking and that the case should not have been submitted to the jury.

The Circuit also concluded that State action was remote in that Epps' conduct was more akin to off-duty police officer cases.

At oral argument, petitioners urged that the facts should be differently viewed in light of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. _____, 109 S.Ct. 998, (1989) (decided after Briefing). The Circuit declined.

Reasons for Granting Writ

I.

Whether placing a felon-teacher with defenseless students with notice and resultant abuse, is the affirmative abuse of government power, triggering the substantive component of the Due Process Clause?

A. Summary of Argument.

Presented herein, is a case involving child abuse

in the public schools with substantial government involvement and implications to a substantial number of vulnerable children. Verdict was obtained with only *Ingraham v. Wright*, 430 U.S. 651 (1977), as a baseline in the public schools. Without any decisional law on abuse in schools, the court below has reversed; analogizing rules of liability in police authority cases which are somewhat remote in application to the case at bar.

It is urged in sequence below that the case is (1) topical, has historical impact and the opinion below presents an inconsistent approach to the developing law of preventing child abuse in the schools; (2) argument is offered as to how this Court's approach in *DeShaney*, supra, establishes a duty in this case; (3) petitioners, in turn, present for this Court's consideration a better reasoned solution than "policy" liability in preventing custodial harm in public school, and by analogy foster care. Finally, petitioners demonstrate that they have preserved their request for review on this question by arguing the implications of *DeShaney* to the court below.

B. There is a compelling State interest in preventing abuse in the schools, and a need for this Court to clarify inconsistent approaches in a developing area of the law.

Petitioners' position is straightforward. Children in the public schools are at risk for abuse and §1983 litigation is a proper remedy. In the case at bar, three students were placed in the classroom with a teacher/coach who had been convicted of a sexual offense. The community in turn gave notice of the arrest and actual abuse through numerous inquiries of inappropriate conduct and still the serious

deprivations occurred. Can there be a more serious potential for harm than the government placing young children in a classroom with a teacher whom the government has also adjudicated a sexual felon? A jury below responded to the school district's failure to fulfill its' duty to protect these children with a verdict which now has been reversed by the Tenth Circuit Court of Appeals.

Senior Judge Barrett, speaking for the panel, is knowledgable in the area of school district liability.[4] Nevertheless, the court seems intent on placing a remedy beyond reach of those who would need it the most. Further, no mention of any compelling interest on the part of the State to prevent child abuse forms any basis of any issue decided below.

While many issues of importance crowd this Court's docket, preventing harm to the young must be a priority.[5] Twenty-nine million children go to school each day in grades one through eight. It is the main activity that the State involves them in. As in all forms of endeavor, inappropriate conduct exists. The potential magnitude of the problem is illustrated by the sheer numbers of state actors in positions of authority over the young. It may take the form of abusing young women or in cases like the one at bar,

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4. James E. Barrett, Judges of the United States, Second Ed., 1983, Government Printing Office, p. 24; biography includes; Sch. Dist., Lusk, WY, 1950-1967, sch. dist. atty.

5. Presently, this Court has two cases argued April 18, 1990 on its docket involving child abuse. They involve balancing a defendant's right of confrontation in criminal prosecution to the state's interest of minimizing trauma to children. *Maryland v. Craig*, No. 89-478, *Idaho v. Wright*, No. 89-260.

young boys. The remedy has been there, but awareness of the problem is recent.

In 1989, this Court vacated two cases from the Third Circuit for further consideration in light of *DeShaney* which involved abuse of young women in a high school by a band director.[6]

The decisions in *Sowers* and *Stoneking* on the pleadings pertain to individual defendants asserting qualified immunity. In order to reach that question, the Third Circuit has made findings in the public school setting which are conflicting in approach to the decision below.

After this Court remanded *Stoneking I*, the Third Circuit went on the affirm in *Stoneking II* and stated at 724, "The situation of school children, compelled by state law to attend school, and physically mistreated by school district employees, may not be dissimilar to that of children in foster homes mistreated by their foster parents." This left the following questions unresolved:

1. Does this mean that a duty in some form exists in foster homes?

2. Does the similarity of foster homes and

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6. See *Sowers v. Bradford Area School District*, 694 F.Supp. 125 (W.D. Pa. 1988), aff'd without opinion, 869 F.2d 591 (3d Cir. 1989), vacated sub nom. *Smith v. Sowers* _____ U.S. _____, 109 S.Ct. 1634 (1989) aff'd on remand 887 F.2d 262 (3d Cir. 1989) *cert denied* (1990). *Stoneking v. Bradford Area School District*, 667 F.Supp. 1088 (W.D. Pa. 1982), aff'd 856 F.2d 594 (3d Cir. 1988), vacated sub nom. *Smith v. Stoneking*, _____ U.S. _____, 109 S.Ct. 1333 (1989), (Stoneking I), and *Stoneking v. Bradford Area School District*, 882 F.2d 720, (3d Cir. 1989), (Stoneking II), *cert. denied* (1990).

public schools implicate a duty to prevent abuse in this case?

3. Is *Stoneking II* in conflict with *DeShaney*?

4. Are *Stoneking* and *Sowers* in conflict with the case at bar concerning state action with the deprivations off school property?

The concise five day trial record of this case presents a convergence of a number of issues, including form of liability, state action and causation that are unresolved in the schools.

This Court thirteen years ago recognized issues of corporal punishment that were being brought to bear at that time in its' holding in *Ingraham v. Wright*, 430 U.S. 651,)1977). It is now argued that such a decision is necessary in the public schools to prevent sexual abuse of innocent children who have done nothing wrong to begin with. Additionally, petitioners argue that certain provisions of this Court's holding in *Ingraham* are no longer viable in the context of the present substantive deprivations. The Court stated in *Ingraham* at 670:

> The openness of public schools and its supervision by the community affords significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner.

While the above is the landmark for corporal punishment in the balancing of the State's interest to discipline, it consistently fails to detect the type of covert deprivations complained herein, and in *Stoneking*. Unlike *Ingraham*, abuse occurs secretly and leaves invisible scars rather than physical marks. It is the invasion of the body, mind and soul. At trial, the children's therapist, Dr. Paul J. Swartz,

indicated that in the vast majority of cases, it goes unreported by the child; either because of intimidation by the actor or because of guilt.[7] (Tr-3-323-325).

If the case at bar stands for any proposition, it is that community supervision does not work in this area and school administrators have to play a more active role in the detection and prevention of abuse within the schools. While the opinion below gave deference to qualified professional judgments, it is respectfully submitted, that with a heightened response Epps would have been prevented from inflicting the harm respondents concede occurred.

This Court has offered protection from abuse of power to prisoners in *Estell v Gamble,* 429 U.S. 97 (1976). Likewise, it has recognized a compelling interest to the unfortunate in mental institutions in *Youngberg v. Romeo,* 457 U.S. 307 (1982). By way of implication, this Court is cognizant of the vulnerability of foster children in its decision in *DeShaney,* 109 S.Ct. at 1006 n.9. The public schools are the final venue that the State places an individual by law. Unfortunately, when abuse is present, harm to children is predictable.

C. DeShaney - The analysis of duty begins and ends with ascertaining in what position the State initially placed the victim.

In *DeShaney v. Winnebago County Department*

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7. Because of Epps' threats to the children, it was only by accident that the abuse was discovered six days later. The aunt of one of the children was able to extract the tragedy, and by questioning each child separately, Epps was exposed. (Tr-2-257-259).

of Social Services, 489 U.S. _____, 109 S.Ct. 998, (1989), this Court rejected Joshua DeShaney's request for relief for injuries suffered at the hands of his father.

In doing so, the Court indicated that the Due Process Clause implicated a duty in cases such as *Youngberg v. Romeo*, 457 U.S. 307 (1982) and *Estelle v. Gamble*, 429 U.S. 97 (1976) and further stated in relation to above cases at 109 S.Ct., 1006:

> In the substantive due process analysis, it is the State's affirmative act of restraining an individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty, which is the "deprivation of liberty" triggering the protection of the Due Process Clause, not its failure to act to protect his liberty interest against harm inflicted by other means. (footnote omitted) (emphasis in original)

This Court thereby rejected the "special relationship" theory whose genesis had begun in *Martinez v. California*, 444 U.S. 277 (1980), by announcing that third party harm to persons at liberty, or the public at large, does not invoke substantive due process.

The facts before this Court when read in light of *DeShaney* reveal the following. First and foremost, the deprivations in this case were committed by a state employee-teacher/coach whom the children bonded to. This is not the private violence of the "special relationship" cases rejected in *DeShaney* at 109 S.Ct. 1004 n.4.

This Court placed great emphasis on the limitations that are imposed on the victim to fend for

himself, rather than "the State's knowledge of an individual's predicament or its' expression of intent to help." The Court stopped short of saying that a full custodial relationship was necessary, only stating a "similar restraint of personal liberty" must be present.

The facts before this Court do not present a picture of total restraint, however, logic must prevail in analyzing this issue. Certainly, state law requiring compulsory school attendance does limit a child's ability to seek aid during periods of time when he is obedient to his teacher and school authority. This is evident, particularly when the violations are as covert and pernicious as in the present case. Conversely, to conclude that a child is completely without aid belies the facts, although the community in this case was unable to expose Epps. The issue of restraint of liberty in this case is *both* physical and mental and is a matter of degree and maturity.

However, substantive limits of the Due Process Clause were transgressed under these facts when the Court went on to say in *DeShaney* at 1006:

> While the State may have been aware of the dangers that Joshua faced in a free world, *it played no part in their creation, nor did it do anything to render him more vulnerable to them.* That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position then in which he would have been had it not acted at all, the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. (emphasis added).

The State did take temporary custody of these children, but more importantly, the State, placed a convicted sexual felon amongst these children. In this instance can vulnerability be more complete?

The exposure of children, by law, to such harm arises to a level of government power "used as an instrument of oppression" *Davidson v. Cannon*, 474 U.S. 344 (1986) at 348.

D. If preventing harm to custodial children by State actors is the issue, then a narrow duty to diligently investigate is the solution.

While *DeShaney* is not offered to suggest a general affirmative duty to provide safe conditions to school children, counsel is haunted by the affirmative abuse of government power exercised upon these children and the dehumanizing consequences. Bonded by law to a sick teacher, defenseless in their immaturity; they were in peril whose creation is attributable to the State.

The above discussion should provoke a remedy at law.[8] This Court in the past has implemented on an incremental basis the Due Process Clause to prevent harm to vulnerable classes, *Youngberg*, supra. Petitioners now ask the Court to consider the question of preventing harm to children by imposing a narrow constitutional duty to diligently

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8. Since Epps acted beyond the scope of his authority, petitioners state tort claim fell within the scope of state immunity and was dismissed. §1983 is not limited by "course of employment" and is discussed infra under Question II concerning State Action. See also, *Sowers v. Bradford Area School District*, 694 F.Supp 125 (W.D. Pa. 1988) supra.

investigate notice of abuse in the schools.

In a foster care setting, the court noted in *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, (CA II 1987), (en banc), *cert. denied* sub nom., *Ledbetter v. Taylor*, (1989) at 797:

> With contemporary society's outrage at the exposure of defenseless children to gross mistreatment and abuse, it is time that the law give to these defenseless children at least the same protection afforded adults who are imprisoned as a result of their own misdeeds.

If the concept of duty springs from what position the State placed the victim in to begin with, then the case at bar is compelling.

The "restraint of personal liberty" herein, is twofold. First, the State required the children's attendance for so many hours of the day. But much more importantly, the State endowed Epps with a position of trust to control the children's very decision-making process which could have avoided the abuse. These limitations, both physical and cognitive, certainly placed restrictions on the children's ability "to act in their own behalf."

Implementing substantive due process as *Taylor* suggests, is consistent with *DeShaney* and is a better reasoned approach than "policy" in preventing abuse in situations where the State places victims in schools and foster care.

Petitioners agree that "deliberate indifference to substantial notice" is the standard. Further, consistent with the above, liability would only attach when the deprivation was committed by a state actor who had been endowed by the State to a *specific*

position of authority to the victim who, in turn, was defenseless to act in his own behalf.

There can be no doubt that this Court looks with a critical eye on plaintiffs, who without state tort remedy, invoke §1983 and request that the Constitution on its' own force provide a duty.

As Judge Easterbrook cautioned even before *DeShaney* in referring to "special relationship", "it has become a magic phrase, a category in which to dump cases when a court would like to afford relief." *Archie v. City of Racine,* 847 F.2d 1211, 1223 (7th CA 1988), *cert. denied,* (1989), (dispatcher's refusal to send ambulance).

While this case cries out for relief, it stands on its' own merits far from *DeShaney* and *Archie.* It should be positioned within the reasoning of *Taylor* without the limitations of *Ingraham.*

The question comes down to this Court's view of whether the "private aid" of the community under *Ingraham,* supra, rendered these children other than defenseless to Epps. While a difficult area, these facts should not fall through the cracks of emerging law without transcript. A humane solution is supported by precedent and requested.

E. Petitioners have preserved their argument above on constitutional liability for this Writ.

When suit was inititated in 1985, petitioners relied principally on *Doe v. New York Dept. of Social Services,* 649 F.2d 134 (CA 2 1981), after remand, 709 F.2d 782, *cert. denied,* 464 U.S. 864 (1983) (State may be held liable under Due Process Clause for failing to protect children in foster homes for abuse at the

hands of their foster parents.)

In 1985, this Court announced its' decision in *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), and the case proceeded to trial under municipal liability theories.

On appeal, petitioners cited *Youngberg v. Romeo*, 475 U.S. 307 (1982), *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, (CA 11 1987) (en banc) *cert. denied* sub nom., *Ledbetter v. Taylor* (1989) for proposition that a substantive right was implicated. (Appellee's Brief 11/88.) Further, with the announcement of *DeShaney* 2/89, petitioners certified ~~the case~~ to the Circuit under Fed. R. App. Pro, 28 (j) and at oral argument 11/89, argued that a duty to prevent the abuse attached under the Due Process Clause and that State Action, should be viewed in light of *DeShaney*. (p. 44a, reference to Appendix herein).

Additionally, prior to opinion, petitioners certified the *Stoneking* cases, for the propostition that constitutional liability in the public school was viable. (p. 45a)

Although the opinion below cited the cases certified by petitioners, the Circuit did not directly address the issue of substantive due process.

As an Appellee in the Circuit without taking cross-appeal, petitioners utilized a well established principle that the winning party below can defend by raising issues newly announced in preserving his judgment.

It is candidly submitted that counsel failed to fully appreciate the significance of *Youngberg*, and the unclear holding of the *Doe* case was superceded in 1987 at trial by *Tuttle*. With the publication of

DeShaney Feb. 1989, the genesis of a narrow duty crystalized and counsel was prudent in certification and argument to the Tenth Circuit. "In a state of evolving definition and uncertainty," petitioners maintain their request for certiorari on the question presented has been preserved for review by this Court.

II.

Whether bonding a felon-teacher with defenseless students, if not an affirmative abuse of power, has critical significance in determining state action by the school district?

A. The school district's actions are not passive in that they created the climate in which the deprivations occurred.

The opinion below chose to apportion a passive role to the school district's involvement in the violations and focus only on Epps' conduct on June 13, 1984, in considering "color of law" and "state action". Both concepts and participants will be dealt with separately.

First, the school district was acting "under color of state law" when Clayton hired Epps in 1981. Respondents do not contest that Clayton was a final policy maker.

The more difficult question is attributing state action to the school district.

> "Only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

The only reference in the decision to anything that the school district did is found at p. 40a.:

> It is by hindsight that the need to make inquiries of law enforcement agencies concerning an applicant's felony record, rather than relying on the fact that a teacher convicted is not entitled to have a teaching certificate in the state of Oklahoma seems clear.[9]

In reasoning lack of state involvement in *DeShaney*, supra, this Court concluded that the State placed Joshua in "no worse position then in which he would have been had it not acted at all." 109 S.Ct. 1006.

Conversely, the school district's state action in providing the setting for the deprivations cannot be ignored.

"Sifting the facts and circumstances" reveals respondents did the following:

(1) hired a teacher who was sexual felon;

(2) placed him in a classroom and gym which gave him complete authority as teacher and coach over children who, in turn, were obedient under this grant of authority to both Epps and the school district;

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9. Query. If Oklahoma (51 O.S.§152(9)) and most States are immune from "corrupt" or "criminal" acts by employees under respondeat superior, regardless of notice, what ultimate *accountability* operates to compel "inquiries of law enforcement concerning an applicant's (Epps) felony record"? Should this Court leave millions of children uncovered? "Hindsight" is instructive to this school district; liability is instructive to all school districts.

(3) caused notices and flyers to be sent home from school and approved the use of their facilities for summer basketball camps.

The opinion below focuses only on (3) above and concludes that although there is some involvement, the activities of June 13, 1984, were not officially sanctioned by the school district. No mention is made that Epps had just spent a year with the children in fifth grade and was to be again their basketball coach in the sixth grade. Can it be said that the children could have reasonably resisted Epps' authority to accompany him? Would petitioners have released their children to other than a current teacher/coach? Were they incorrect to reasonably conclude that it was for a school related function?

The acts by the school district in the above are significant and call to mind Judge Posners' "snake pit" analogy in determing whether they are only "passive." *Bowers v. DeVito*, 686 F.2d 616, 619 (CA 7 1982).

B. A teacher/coach is to his students/players, as an off-duty policeman is to the general public; the analogy of the opinion below in determining Epps' conduct is too remote to be attributed to the school district.

The "person" alleged to have caused the underlying deprivations to the children's rights is the school district. Whether Epps was acting under color of law or was a state actor would be material if Epps' private liability were the question. It is not. "Instead, the suit is against the School District, and they were incontestably acting under color of state law." *Stoneking II*, 882 F.2d 720, at 724.

In any event, Epps' conduct of June 13, 1984, is certainly relevant in determining attenuation to the the school district's state action. In other words, even if the school district did put certain forces in motion, was the setting where acts occurred too remote to be attributed to them?

The decision ignores these "forces" and focuses only on how Epps stood on responsibility to the school district and not the children. The opinion concludes that on June 13, 1984, Epps was off-duty and although his contract had been renewed for August, 1984, he wasn't on the payroll, case closed.[10]

> The decision goes on to reason at p. 27a:
> Epps was, on June 13-14, 1984 acting in a status similar to that of an "off duty" policeman, except that Epps was absolutely free from all obligations or duty to School District. Thus, the nexus is much more tenuous in this case, than that of an "off duty" police officer.

Whether Epps is absolutely free from obligations to the school district while under contract ignores volumes of law, but is not for discussion herein. Whether the nexus is much more tenuous is discussed below. To support the analogy, the decision cites four off-duty police officer cases at ppg. 34a-37a.

The analogy is flawed. No weight is given to the total authority and control that Epps possessed by and through the school district, over the decision-

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10. This is incorrect. Daniels stated that he gave Epps checks in May, 1984 postdated for the summer. Tr-3-402. Either way, its' relevancy is minimal.

making process of immature minds. The teacher/student relationship in this case was nurtured for a year in the classroom and in the gym. The random encounters of off-duty policemen with mature minds hardly presents this vulnerability.

Additionally, the cases cited in the decision involve plaintiffs who were at the scene of the deprivation, (banks, racetrack, store) free from any earlier directive by the actor. In short, they were going about their business. In turn, the victims in these cases could probably perceive that the officer was "moonlighting" his authority for security purposes to businesses other than the Police Department.

The children in this case knew Epps was their teacher/coach and went with him because his authority was singular. He did not have to pull out a badge or wear a uniform.

The above discussion distinguishes the analogy of the opinion below as to the relative positions of the parties. The question before this Court is attributing Epps' conduct on June 13, 1984 to the school district because of that position.

It is not suggested that the school district's involvement would include other then specific grants of authority. It therefore follows, that if Epps was not their current teacher/coach, attenuation would be present. Further, if he had called without notices of basketball camps sent home by the school district or asked to take the children boating, petitioners, in turn, would have been in a better position to exercise parental authority. Most scenerios other than the one at bar would not implicate the school district in private conduct.

Unfortunately, most abuse practiced takes place off of school property, *Sowers* and *Stoneking*, n.6 supra. The involvement of schools has to be limited by specific facts which show that the underlying deprivation is attributable to them.

On the other hand, to conclude involvement in teacher abuse is nothing less than a teacher acting in his official capacity; on school grounds, while on duty performing acts sanctioned by the school district belies reality and the compelling interest to prevent harm to children.

It is evident that the parameters of state action in teacher abuse is emerging and unclear and, although once before this Court in *Sowers* and *Stoneking*, has not been defined.

III.

Whether a municipality is vicarious from causation solely because the policy pursued never contemplated abuse to children, and excused from fault solely because the municipality responded to substantial notice with good faith discretion by the final policymakers?

A. Repeated notice of the identified deficiency in hiring Epps and its' causal link to these injuries.

The opinion has offered *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), at p. 30a, for the proposition that the "subject matter" of the school district's policy must be the same as "the alleged deprivation of constitutional rights which occurrred June 13-14, 1984".

In other words, petitioners must prove that

responsible policymakers consciously "decided" a policy of child abuse. This is an impossible submission and overlooks the obvious fact that the school district hired a sex offender. After actual notice of this, and other conduct, Epps abused the children. Once the degree of fault is proven, causation is direct when the notice of the potential harm is directed at, and relative to, the deficient overall policy. The "subject matter" of the policy herein was a series of choices by the final policymakers not to properly investigate notice that Epps would commit harm.

In *City of Canton, Ohio v. Harris*, 489 U.S. _____, 109 S.Ct. 1197 (1989), this Court announced that under limited circumstances a constitutional policy can lead to constitutional deprivation."

It is submitted that the case at bar is well within *City of Canton.* Moreover, if the final policymaker can pursue a constitutional policy that is actionable, then there are times that he cannot clearly perceive how his policy decisions will result in a particular violation. This is when the degree of indifference to notice aggravates and establishes causal link. The court concludes at p. 31a that *Martinez v. California*, 444 U.S. 277 (1980), is controlling because "the acts of Epps and the conduct of the District" are not causally connected. It is respectfully submitted that *Martinez* did not involve policy liability and causation is defined by

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11. A constitutional policy can be unconstitutionally applied. See *Tennessee v. Gardner*, 471 U.S. 1 (1985). The similarity between the instant potential for harm and *Gardner* is evident. However, *Gardner* and *Pembaur* involved an enumerated Fourth Amendment right. Child abuse is not enumerated and therefore, petitioners have requested Fourteenth Amendment analysis, supra, Question I.

the link between the actual operation of the policy and the deprivation.

Seldom will this Court be presented with injuries so related to deficiencies in policy and conscious choices made therein. *Pembaur* has been applied incorrectly to these facts.

B. Deliberate indifference is an objective standard while good faith discretion is not available to the school district to limit that standard.

Instituting suit in 1985, petitioners only named the school district. Clayton and Daniels were not defendants. Without §1983 precedent on abuse, and mindful of concepts of "clearly established constitutional rights" and "discretionary function," *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), was controlling. (Qualified immunity).

However, the court consistently characterized the actions of the policymakers in terms of discretion. The reference to *Stoneking II*, supra, at p. 33a reveals this approach. In comparing liability very similar to the one at bar, the decision states *inter alia*, "Significantly, however, the court reversed the district court's denial of a motion for qualified immunity filed by Frederick Shuey, the superintendent of the school district."

Without discussion on how Epps' acts could have been prevented, or how Clayton's and Daniels' responses to notice compared with Shuey's immunized acts, the court concluded at p. 40a: "Nothing done or undone by Dr. Clayton or Principal Daniels, however, could give rise to deliberate indifference to the constitutional rights of the plaintiffs."

Thereafter, the opinion quotes *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) for the proposition that discretion by an employee cannot give rise to a constitutional violation. The case is misapplied in two ways. *City of St. Louis* involved identifying the final policymaker, which has not been raised at any stage of the proceedings. Further, respondents conceded at trial that Clayton and Daniels were the final policymakers herein. (Tr-3-422). In that capacity, and without personal liability, they possessed "no discretion to violate the Federal Constitution" *Owens v. City of Independence*, 445 U.S. 621 (1980) at 649.

An objective determination of whether Clayton and Daniels combined course of action could be considered sufficient to establish liability should have been the inquiry. The decision mentioned this Court's latest holding in *City of Canton, Ohio v. Harris*, 489 U.S. _____, 109 S.Ct. 1197 (1989), but failed to compare the facts.

It is given that Mrs. Kelley's initial phone calls were at least the equivalent to Mrs. Harris' notice of deficient medical care in *City of Canton*. In turn, other accumulated reports of Epps' potential for harm would at least reveal that the quantum of evidence offered in both cases was clearly distinguishable.

In excusing the discretionary acts of the policymakers in determining the standard of liability, the court has also significantly departed from the standard of review. The simple answer to the court's view of policymaker's response to notice, is that a properly instructed, rational jury disagreed.

They found Mrs. Kelley to be a credible witness

who repeatedly tried to warn the school district of information provided by Epps' family that was prophetically accurate. They heard the testimony of Richard A. Lewis, respondent's private investigator, who examined every aspect of Mrs. Kelley's life without finding anything to diminish her credibility. (Tr-4-ppg. 512-548).

The jury chose to believe Martin Brown, who had worked six years as a detective for the Garland Texas Police Department and three years in the Dallas Court Clerk's office, that Epps' conviction for sodomy was readily available *in 1981 if* the school district had called law enforcement in Dallas. (Tr-2-ppg. 196-214). The installation of computers in Dallas in 1984 after these deprivations, is a "red herring."

Each time notice was presented to the school district after Mrs. Kelley's phone calls, it becomes increasingly harder to accept the word "rumor" used below. It is submitted that with the potential for harm incrementally present, that this is not "negligence" spoken of in *Davidson v. Cannon*, supra. The hiring of Epps was negligence. Thereafter, responses to notice establishes the burden.

This Court has in the past in *Davidson* and *City of Canton* indicated what *does not* constitute deliberate indifference. This case presents strong argument for what does meet this standard. Discussion of arrest checks and inadequate abuse grievance procedure certainly presents the framework for such analysis; along with benefit that will enure to vulnerable children and parents.

In addition as to whether *Owens* was ignored in the analysis above, the case may need remand under

City of Canton since the district court coupled "reckless disregard" with deliberate indifference in instructions. (ppg. 20a-21a).

In reviewing fault and causation and the many hypothetical combinations that are present in §1983 actions, this Court concluded in *City of Canton* at 428, that while not an easy endeavor, "judge and jury doing their respective jobs, will be adequate to the task."

Whether the trial judge and jury were adequate to the task is the question herein. Whether counsel was adequate to the task as "private" attorney general is another question. As a sole practioner, counsel accepted this challenge over five years ago and has given every resource available to that end. The rationale was the belief that if just one child in the future could be spared this preventable harm, then it had to be done. The task has been completed in the Northern District of Oklahoma.

Sometimes review is suggested regardless of result. The granting of this Writ is clearly a step in the right direction for school children everywhere.

CONCLUSION

WHEREFORE, Petitioners pray that a Writ of Certiorari issue from this Honorable Court to review the judgment of the United States Court of Appeals for the Tenth Circuit in this action. In the event that the Petition is granted, Petitioners pray that the judgment of the Court below be reversed, that the cause be remanded with instructions.

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Counsel for Petitioners

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1990

D.T., a minor, by his legally appointed guardians;
M.T. and **K.T.** as parents and legal guardians of **D.T.**;
F.H., Jr., a minor, by his legally appointed guardians;
F.H. and **L.H.**, as parents and legal guardians of **F.H., Jr.**;
P.M., a minor, by his legally appointed guardian;
R.T., as parent and legal guardian of **P.M.**,

Petitioners

vs.

INDEPENDENT SCHOOL DISTRICT NO. 16
of Pawnee County, Oklahoma,

Respondents

On Writ of Certiorari
to the United States Court of
Appeals for the Tenth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioners

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

D.T., a minor, by his legally appointed guardians; M.T. and K.T. in their own behalf as parents and legal guardians of D.T.; F.H., Jr., a minor, by his legally appointed guardians; F.H. and L.T., in their own behalf as parents and legal guardians of F.H.; P.M., a minor by his legally appointed guardian; R.T., in her own behalf as parent and legal guardian of P.M.,	)	
Plaintiffs-Appellees	)	
v.	)	Nos. 88-1619, 89-5037, and 89-5077
INDEPENDENT SCHOOL DISTRICT No. 16 of Pawnee County Oklahoma,	)	
Defendant-Appellant.	)	

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 85-C-206-E)

Frank A. Zeigler, Tulsa, Oklahoma, attorney for Plaintiffs-Appellees.

Edward J. Main (James K. Secrest, II on the briefs), of Secrest and Hill, Tulsa, Oklahoma, attorney for Defendant-Appellant.

Before **LOGAN**, **BARRETT** and **EBEL**, Circuit Judges.

BARRETT, Senior Circuit Judge.

This appeal arises out of a civil rights action brought by the plaintiffs-appellees, three male elementary students seeking damages from the defendant-appellant, Independent School District No. I-6 of Pawnee County, Oklahoma (School District) in connection with sexual acts committed against the plaintiffs by Stephen Lee Epps (Epps), a male teacher of School District, during summer vacation and in relation to fund raising for a summer basketball camp.

This 42 U.S.C. §1983 action was predicated upon a complaint that the School District was guilty of deliberate indifference or that it acted with reckless disregard of plaintiffs' constitutionally protected liberty/privacy interests in the hiring, supervision and investigation of Epps who sexually molested plaintiffs. The complaint charged that the wrongful conduct of the defendants constituted "[a] violation of the plaintiffs' Federal Constitutional and statutory rights of privacy, liberty, substantive due process, equal protection and is a violation of their Fourth Amendment right to be secure in their person and other rights protected by the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution . . ." (R., Supp. Vol. I, Tab 1, p. 8). Further, the complaint alleged that the hiring of Epps was the "moving force" behind the sexual abuse practiced by Epps upon plaintiffs and was, accordingly, state action taken under color of state law. Jurisdiction was predicated on 28 U.S.C. §§ 1331 and1343(a)(3) and 42 U.S.C. § 1983.

The jury awarded damages of $42,000 each to D.T. and P.M. and $50,000 to F.H.

GENERAL BACKGROUND

Prior to the commencement of the 1981 school term, Epps, then some thirty years of age, was hired to teach fifth grade and also coach the boys' basketball team at Terlton Elementary School, Terlton, Oklahoma. The application-screening interview process was conducted by Dr. Charles Clayton, Superintendent of the Cleveland, Oklahoma, Public Schools. Mr. Donald K. Daniels, Principal at Terlton Elementary School, participated in the interview of Epps with Dr. Clayton. Principal Daniels recommended to Dr. Clayton that Epps be hired, and Dr. Clayton made that same recommendation to the School District Board. For purposes of this litigation, Dr.Clayton and Principal Daniels were considered policy making officials representing the defendant-appellant School District.

In 1971, Epps had been, unbeknownst to Dr. Clayton or Principal Daniels, convicted of sodomy in Dallas County, Texas. His criminal file was maintained under the name of Steve Epps. Epps was on probation when hired to teach in 1972 at Houston Elementary School in Lancaster, Texas. He taught fourth and fifth grades there until 1977. When he was hired there, the school district did not make specific inquiry of Epps about a criminal record because, under Texas law, one could not hold a teaching certificate if he/she had a criminal record. The same was true in Oklahoma when Epps was hired in 1981.

Prior to the commencement of the school term in 1981 but after Epps had been hired, Dr. Clayton received a telephone call from Mrs. Kelley, a cousin

of Epps, from Phoenix, Arizona. Mrs. Kelley informed Dr. Clayton that Epps had visited her home in Phoenix that summer and had physically fondled her eleven-year-old son in his private parts.

Dr. Clayton considered the Kelley report as most serious. He proceeded to make a number of contacts and inquiries concerning Epps and requested that Principal Daniels make an investigation, including a personal confrontation with Epps concerning these charges. Principal Daniels did so, and Epps denied any wrongdoing. He claimed that Mrs. Kelley wanted him to remain in Phoenix at her home and that she made these charges because he did not stay with her.

During the fall of 1981, Principal Daniels was informed by two or three other individuals of similar rumors about Epps but no complaints had ever been lodged against Epps. Dr. Clayton requested that Principal Daniels keep close track of Epps. There were no additional rumors or reports of any kind adverse to Epps following those made in the fall of 1981. The incident between Epps and the three minor male plaintiffs occurred on June 13-14, 1984, when the three plaintiffs, each members of Epps' fifth grade class, went with Epps to Sand Springs and Tulsa, Oklahoma, to sell candy to raise money for summer basketball camp "scholarships" and stayed overnight at Epps' home.

UNDISPUTED FACTS

(Relative to the School District's Policy of Hiring and Supervising Teachers)

Dr. Clayton accepted applications for a position of fifth grade teacher and boys' basketball coach at the

Terlton Elementary School, during the summer of 1981 for a contract term from August, 1981, to the end of May, 1982. (R., Supp. Vol. II, pp. 74-75). The application and selection process followed by Dr. Clayton was the normal, accepted procedure used in the State of Oklahoma (R., Supp. Vol. III, pp. 160-64). The first step in the procedure was that of notifying four or five universities or colleges in Oklahoma of the vacancy and advising that applications would be accepted and screened (R., Supp. Vol. II, p. 74).

One of the applications received was from Epps who was then the Superintendent of Schools of Wann, Oklahoma. Id. The application form used in this case (just as all such forms in Oklahoma) did not contain any place thereon for reference to an arrest or criminal record because a teacher with a felony record cannot obtain or retain a teaching certificate from the State of Oklahoma. (Id. at 76; R., Supp. Vol. III, p. 1640; R. Supp. Vol. IV, p. 445). It was the policy of the school district, however, to ask "support" personnel whether they have been arrested. (R., Supp. Vol. III, p. 111). In the case of teachers, the school district relied on the certification process. Id.

The certificate relative to the Epps application, just as the certificates for all other applicants, came to Dr. Clayton from Oklahoma State University and contained confidential, complete information about the applicant's educational background, academic honors, and professional standing (R., Supp. Vol. II, p. 80). In addition, Dr. Clayton received from Oklahoma State University recommendations from college professors and principals-superintendents where Epps had taught or worked. Id. at 81. Dr.

Clayton, prior to conducting the personal interview with Epps, conducted telephone interviews with those listed as recommenders. Id. at 81, 114. Both the certificate and recommendations were returned to Oklahoma State University following the personal interview of Epps conducted by Dr. Clayton and Principal Daniels. Id. at 82. The interview with Epps was conducted during the month of May, 1981, and lasted about one hour (R., Supp. Vol. III, p. 108). At the conclusion of the interview, Principal Daniels recommended to Dr. Clayton that Epps be hired. (R., Supp. Vol. IV, p. 444).

Dr. Clayton, who had served as Superintendent of the Cleveland Public Schools since 1979, and who supervises the entire educational program for the Cleveland schools, including principals (R., Supp. Vol. II, p. 73), recommended to the school board that Epps be hired as the fifth grade teacher and coach of boys' basketball at Terlton Elementary School for the school year September 1, 1981, to June 1, 1982 (R., Supp. Vol. III, pp. 104, 168-69). Terlton, Oklahoma, is a small town with a population not exceeding 300 persons. (R., Supp. Vol. V, p. 567).

A person convicted of a felony in Oklahoma cannot have a teaching certificate. (R., Supp. Vol. III, p. 164) (testimony of Dr. Clayton); (R., Supp. Vol. IV, p. 445) (testimony of Principal Daniels). Martin Allen Brown, a private investigator employed by the plaintiffs, testified that in checking the court records of Dallas County, he was only able to locate the Epps "sodomy case" file by using a computer and referencing to the name "S" Epps which directed him to a 1971 conviction of one *Steve Epps*. (R., Supp. Vol. III, pp. 197-99). He agreed that if the name Stephen Lee Epps had been used in the

computer search that it would not have shown the conviction. Id. at 213. Furthermore, in 1981, there was no computer system available to conduct such an inquiry and it would have been a matter of diligence and competency of any person working in the clerk of court's office to equate the file of Steve Epps to Stephen Lee Epps. Id. at 208-09.

On or about August 11, 1981, Mrs. Diane Kelley of Phoenix, Arizona, mother of three minor children, phoned Dr. Clayton at his office in Cleveland, Oklahoma (R., Supp. Vol. II, p. 42, 116). Mrs. Kelley related that Epps, her cousin, had recently visited at her home in Phoenix and that Epps had physically fondled her eleven year old son in his private parts and that she was very afraid of the situation because she learned that Epps was to teach in Oklahoma. (R., Supp., Vol. II, p. 42, 55; R., Supp. Vol. III, p. 116). Dr. Clayton's notes indicate that Mrs. Kelley may have referred to Epps as a child molester. Dr. Clayton treated Mrs. Kelley's inquiry as most serious, (R., Supp. Vol. III, p. 124), because in the course of his more than 30 years in the educational system, he had never experienced a teacher who was a child molester. Id. at 127. Dr. Clayton informed Mrs. Kelley that he would get in touch with Epps' principal and conduct a full investigation, (R., Supp. Vol. II, p. 45).

Following the call from Mrs. Kelley, Dr. Clayton first contacted Principal Daniels and asked him to make personal contact with Epps concerning the Diane Kelley allegations. (R., Supp. Vol. III, p. 112; R. Supp. Vol. IV, p. 360). Principal Daniels had been in the school system for some 35 years and had observed abused or sexually abused children. Id. at 366. Principal Daniels did confront Epps with the

allegations made by Mrs. Kelley and spoke with him at length about the matter. Epps denied touching Mrs. Kelley's child, absolutely denied that he was a homosexual and claimed that the reason Mrs. Kelley made the call and leveled the charges was because she was mad that he left Arizona. Epps claimed that Mrs. Kelley wanted him to stay with her and not to return to Oklahoma. Id. at 377, 378. Principal Daniels considered that to be a plausible explanation and was personally convinced that Epps would not harm children. Id. at 379, 381.

Dr. Clayton testified that he also pursued the following inquiries in order to check out the serious allegations made by Mrs. Kelley:

(1) He phoned Larry Ferguson of Cleveland, Oklahoma, who was then serving as president of the board of education and notified him of the call received from Mrs. Kelley (R., Supp. Vol. III, pp. 116-17). Ferguson related that it would be necessary to "double check" the places of Epps prior employment but that he was not too concerned because Epps was then dating a female teacher in Cleveland (R., Supp. Vol. IV, pp. 562-63).

(2) Dr. Clayton phoned Ben Lacy, principal of Drumright, Oklahoma, School (R., Supp. Vol. III, p. 120). He had already received good reports from Lacy relative to Epps work at Drumright during the interview screening process. Id. at p. 168. When Dr. Clayton advised Lacy of Mrs. Kelley's charges, Lacy stated that he had heard rumors about Epps concerning child abuse and that one board member, Peggy Pruitt, had informed him that she had heard rumors to the effect that Epps was homosexual. Id. at 147.

(3) Dr. Clayton next phoned Glenn Thompson Jones, of Lancaster, Texas, Principal of Houston Elementary School where Epps served as a fourth and fifth grade teacher from August, 1972, to June of 1977 (R., Supp. Vol. III, pp. 120-21; R., Supp. Vol. IV, p. 495). Dr. Clayton related the information received from Mrs. Kelley to Jones including the report that Epps had been fired there. Jones related that he had no knowledge of a sexual molestation or abuse of children incident involving Epps before Epps was hired at Houston Elementary School, and that he knew of no incident involving Epps and young children during the five years Epps taught at Lancaster. (R., Vol. IV, pp. 496-97). Jones informed Dr. Clayton that Epps did a good job there, that he would hire Epps back if he applied for a job and that Epps left on his own (R., Supp. Vol. III, p. 121; R., Supp. Vol. V, pp. 496-97). Principal Daniels also phoned Jones and he, too, was told that Epps had not been fired from his teaching job at Lancaster and that he could have retained his job if he had desired. (R., Supp. Vol. III, p. 384).

(4) Dr. Clayton also phoned the Wann, Oklahoma, elementary school and again obtained a very favorable report and recommendation concerning Epps. (R., Supp. Vol. III, pp. 167-68).

With the report from Principal Daniels concerning his conference with Epps and the lack of any credible evidence of acts of child molestation or homosexuality on the part of Epps, Dr. Clayton believed that he had done everything reasonable to investigate the matter under the circumstances (R., Supp. Vol. III, p. 124). Dr. Clayton requested that Principal Daniels watch Epps closely (R., Supp. Vol. IV, p. 360).

Principal Danniels testified that he did watch Epps closely, by spontaneous visits to his classroom, going to basketball practices and games, and seeing Epps every school day. Id. However, he never observed Epps touching young boys in any unusual manner. Id. at 362. Principal Daniels wrote six formal evaluations of Epps' performance as a teacher at Terlton Elementary School from 1981 until 1984 (three school years) and placed Epps in the highest category. Id. at 362-65. He testified that he heard no rumors about Epps beyond those that he had heard in 1981 and could find no basis to support them. Id. at 376.

Principal Daniels also testified that he was contacted by Mrs. Charlotte Johnson during the fall of 1981 and that she told him about rumors that Epps was homosexual and that she indicated a concern that he would harm children. (R., Supp. Vol. III, p. 216; R., Supp. Vol. IV, p. 370). Mrs. Johnson did not know of any incidents involving Epps. Id. at 371. Principal Daniels told Mrs. Johnson about a week later that he couldn't find any evidence on Epps (R., Supp. Vol. III, p. 217). Principal Daniels testified he took such rumors seriously and in his opinion the only thing more serious would be murder. (R., Supp. Vol. IV, p. 387). This rumor was relayed to Dr. Clayton by Principal Daniels (R., Supp. Vol. III, p. 149). Principal Daniels testified that the "rumors" concerning Epps died down because there were no incidents during the three school years he taught at Terlton. (R., Supp. Vol. IV, p. 392).

When Mrs. Kelley phoned Dr. Clayton during the spring of 1982, he informed her that Epps was getting along fine, that "we" had no problems with him and that Epps was dating a female teacher

(R., Supp. Vol. III, p. 126). Dr. Clayton testified that he "probably" concluded that Mrs. Kelley was in error concerning any problems Epps may have had in Dallas, Texas. Id. at pp. 126-27. He testified that nobody made any references concerning any improprieties between Epps and young boys during the three years he taught at Terlton Elementary School (R., Supp. Vol. III, p. 114).

Walter C. Potts testified that he served as custodian of Terlton Elementary School and that in August, 1981, he told Principal Daniels that one of the school maintenance supervisors had seen Epps and remarked that Epps had been run out of Drumright "for fooling around with them little boys." (R., Supp. Vol. III, pp. 192-93). Principal Daniels in turn related this rumor to Dr. Clayton who in turn checked the rumor out with Mr. Lacy, the principal, and other school officials at Drumright (R., Supp. Vol. IV, p. 371). Lacy informed Dr. Clayton that he had heard rumors about Epps but that no official complaints had been made (R., Supp. Vol. III, p. 147). Dr. Clayton conveyed the remarks by Lacy and rumors conveyed by Peggy Pruitt to the school board. Id. at 146-47.

Mrs. Debbie Hewitt, mother of Nathan Hewitt who was a student in Epps' class at Terlton Elementary School in 1981-82, was concerned about rumors that Epps wanted to "spend time with my son" and reported this to Principal Daniels who said he would check it out (R., Supp. Vol. IV, 352-54). She stated that on a follow-up visit, Principal Daniels stated that he could not find out anything. Id. at 355. Principal Daniels has no recollection of a visit with Mrs. Hewitt in May, 1982, concerning the rumor that Epps may be a pedophile. Id. at 358.

Dr. Clayton testified that the first information he had concerning Epps' conviction in Texas came in July, 1984, when Epps was charged in Oklahoma and that he had been told the Texas criminal record had been expunged. Id. at 78. In retrospect, Dr. Clayton acknowledged that it would have been advantageous had he been informed of Epps' criminal record. Id.

DISPUTED EVIDENCE

(Relative to the School District's Policy of Hiring and Supervising Teachers)

Mrs. Kelley testified that in addition to advising Dr. Clayton of Epps' fondling of her son, she also told Dr. Clayton that she had learned that Epps had been arrested in Dallas for a similar incident (R., Supp. Vol. II, p. 44). Mrs. Kelley also testified that she obtained Principal Daniels' name about two or three days after speaking with Dr. Clayton and that she repeated to Principal Daniels what she had told Dr. Clayton. Id. at 47. Mrs. Kelley testified that she asked Principal Daniels to call her back about the outcome of his investigation into the situation, but she called him instead and Principal Daniels stated to her that he had a personal conference with Epps, found that Epps was dating a female and that everything seemed to be all right. Id. at 48, 49, 60-61. Mrs. Kelley stated that she recalled informing Dr. Clayton that her family had related to her that Epps had been arrested in Texas. Id. at 58. She acknowledged that she was upset when she phoned Dr. Clayton and that she may have stated that she had been told that Epps was fired from his job in Texas for "being a child molester" as opposed to relating that he had been arrested. Id. at 59.

Dr. Clayton testified that when Mrs. Kelley

phoned him on August 11, 1981, he treated her call as a serious inquiry both because of the allegation concerning Epps' fondling of her 11-year old son and also because she had related that her mother had informed her that Epps had been fired from the Dallas school. (R., Supp. Vol. III, pp. 116, 118) Dr. Clayton testified, however, that Mrs. Kelley definitely did not inform him that Epps had been arrested in Dallas. Id. at 118, 121. Dr. Clayton testified that if Mrs. Kelley had told him that Epps had been arrested, he would probably have contacted law enforcement officers (R., Supp. Vol. III, p. 185).

Principal Daniels testified that he did not at any time receive a call from Mrs. Diane Kelley, (R., Supp. Vol. IV, p. 358-59), and that Dr. Clayton advised him of the call received from Mrs. Kelley and of the allegation of sexual misconduct by Epps toward Mrs. Kelley's minor son and the report that Epps had been fired from a school in Texas. Id. at 358-59. He was never advised that Epps had been arrested in Dallas. Id.

Richard A. Lewis, a private investigator employed by the defendants, testified that he spoke by telephone with Mrs. Diane Kelley on May 6, 1987, and that she related that she had made two or three calls to Dr. Clayton, whom she referred to as the principal (R., Supp. Vol. IV, p. 534). Lewis had no recollection that Mrs. Kelley ever stated that Epps had ever been criminally charged. Id. at 549.

Mrs. K.T., mother of D.T., one of the Terlton Elementary School boys molested by Epps, testified that after the incident she and Mrs. L.H., mother of one of the plaintiffs, called upon Dr. Clayton and that he told them he was shocked about the incident and

that Epps had been suspended and would not be in the school system any longer. (R., Supp. Vol. III, p. 228) She testified that when she and Mrs. Baker returned to Dr. Clayton's office a few days later, he told them that they were troublemaking parents and that Principal Daniels was a good principl. Id. at 229. Dr. Clayton denied ever telling the mothers that they were troublemaking parents. Id. at 157. Dr. Clayton testified that when he learned of the child molestation incident involving Epps and three of his male students at Terlton Elementary School that he invited all of the mothers of the children to come to his office, which they did, and that he offered the school guidance center and advised them that he would meet with them again that week. Id. at 156-57. He did meet with them two days later. Id.

UNDISPUTED EVIDENCE

(Relative to the Summer Basketball Camp and Solicitation of Funds for Attendance at the Camp)

Epps was hired to teach the fifth grade and be the boys' basketball coach at Terlton Elementary School commencing with the school year 1981. (R., Supp. Vol. III, p. 170). Epps was hired on a year-to-year basis commencing in late August to the end of May. Id. at 171. Epps had no duties or obligations under his contract as a teacher and coach after the school term ended in May until it commenced again in late August of each year (R., Vol. III, pp. 467-69). Epps received his checks for the summer months sometime toward the end of May each year when he completed his work (R., Supp. Vol. IV, pp. 402-03). Epps taught and coached at Terlton Elementary School for three years. Id. at pp. 357-58.

For some years prior to 1984, a short summer

"basketball camp" had been held at Oklahoma State University for elementary grade school children, operated by persons independent of regular school functions. (R., Supp. Vol. IV, pp. 395-96). During the summer of 1984, however, the basketball camp was operated and directed by Larry Warden (Coach Warden), who worked during the regular school term as the girls' basketball coach at the Cleveland schools. The camp was to be held the summer of 1984 at the Cleveland High School facilities. (R., Supp. Vol. III, pp. 179-81; R., Supp. Vol. IV, pp. 461-63). This function was approved by the school board on May 7, 1984 (R., Supp. Vol. III, p. 179) under arrangements with Coach Warden whereby he agreed to provide insurance and many other things (R., Supp. Vol. IV, pp. 462-63). There is nothing in the record demonstrating that the school district sponsored, organized or managed the basketball camp. Prinicpal Daniels testified that there are various summer basketball camps throughout the State of Oklahoma which cost the participants various amounts of money and that they are voluntarily attended. Id. at 464.

A "notice" or "flier" concerning a basketball game to be played at the outdoor basketball court at Terlton Elementary School in May, 1984, was prepared by Coach Warden, and circulated to the students at the school. The circular announced that a game would be played between the parents and the children to raise money to send basketball players who could not afford the admission fee to the camp. (R., Supp. Vol. IV. pp. 392-93; R., Supp. Vol. III, pp. 179-80). Principal Daniels explained that the Terlton Elementary School is a small school, that there is no newspaper in the community and that there are

many activities where the primary notice is a bulletin concerning the volunteer fire department, water board meetings, Girl Scouts, etc., distributed to the children at school to take home to their parents (R., Supp. Vol. IV, pp. 392-94). Principal Daniels stated that because there were so few people in Terlton who subscribed to the Cleveland newspaper, in order to reach the majority of people in the community, distribution of notices through the school students was one avenue used. Id. The Terlton Elementary School building was used for various community activity meetings, such as volunteer fire department, summer basketball programs, Girl Scouts, Boy Scouts, and Brownies. Id.

The outdoor basketball game played at the Terlton Elementary School playground during one evening in May, 1984, was not organized, sponsored or promoted by the school. Id. at 464. Parents and other volunteers worked at concessions during the basketball game. Id. at 396. The school did not contribute any money to the game or to the summer basketball camp or to any student who wished to attend. Id. at 460-64. None of the proceeds from the game went to Terlton Elementary School. Id. at 460. Mrs. L.H. testified that she found out after this game that it was not sponsored by the school. (R., Supp. Vol. III, p. 266).

Another "flier" or "notice" prepared by Coach Warden was also distributed at Terlton Elementary School advising that a summer basketball camp would be held at Cleveland High School. Id. at 395. Larry Ferguson, former member of the Cleveland School Board, testified that the school board has never approved or sanctioned any activity to raise money for grade school children to attend summer

basketball camp (R., Supp. Vol. III, p. 568).

Principal Daniels testified that he spoke with Epps on several occasions in 1983 and 1984 about activities involving raising money for the summer basketball camps and explained that the summer basketball camps could not be a school activity and whatever Epps did in that regard would be "as a volunteer in the community," (R., Supp. Vol. IV, p. 400), and that he would not be doing it as a school basketball coach. Id. at 401.

On June 13, 1984, Epps took the three minor children, all members of the Terlton Elementary School basketball team, ages 11, 11 and 13 respectively, (R., Supp. Vol. III, p. 94), to Sand Springs and Tulsa, Oklahoma, to sell candy to raise money for the summer basketball camp. Id. at 236. The three minor children had their parents' permission to go with Epps to sell the candy. Id. at 236, 282, 295. The three minor children also had permission from their parents to spend the night with Epps. Epps sexually abused each of the plaintiffs during the June 13-14, 1984, time period.

There is no relevant disputed evidence in the record relating to the summer basketball camp and solicitation of funds for attendance at the camp.

JURY VERDICT - COURT INSTRUCTIONS INTERROGATORIES

The district court, early during the trial, observed that "[T]he issue in this case is whether there was a policy followed by the defendant which resulted in these acts being committed and allowing these acts to be committed. We are not trying a negligence case. . . we are trying a 1983 case." (R., Supp. Vol. III,

p. 139). Again, during trial, the court gave the following limiting instruction:

> This is a civil rights case rather than a negligence case. The plaintiffs claim that the defendant's actions deprived them of their constitutional rights. In order for a school district to be liable for depriving a person of his civil rights, it must have established an official policy which caused the deprivation. To constitute official policy the policy need not be in writing. However, the policy must be a deliberate choice of an employee of the school district and that employee must be responsible for establishing final policy with respect to the subject matter in question.

Id. at 188.

After the defendant moved for a directed verdict following the plaintiffs' case, counsel for the defendant argued that the evidence simply did not support the proposition that Dr. Clayton and/or Principal Daniels had displayed reckless disregard or deliberate indifference to the constitutional rights of the plaintiffs in the hiring of Epps (R., Supp. Vol. IV, pp. 419-23). Further, counsel for the defendant argued that even should *the court* find deliberate indifference in the hiring of Epps by the defendant, still the plaintiffs must show that this was the "but for" leading to the molestation incidents of June 13-14, 1984. Id. at 422. Counsel for defendant argued that, as a matter of law, the acts committed by Epps on the plaintiffs on June 13-14, 1984, were not committed by an employee of the school district but rather as a private individual because Epps was not then acting for the defendant as a teacher or coach. Id. at 424.

The district court observed that it had come very close to sustaining a motion for summary judgement filed by defendants on the pleadings, but that the court was now satisfied that the policy issues should go to the jury, Id. at 427, and that reasonable men could differ as to whether the investigation conducted by the school district was totally inadequate and could rise to the level of reckless disregard or deliberate indifference. Id. at 434. The motion for directed verdict was denied.

The motion for directed verdict was renewed by the defendant at the conclusion of all evidence and denied by the court (R., Supp. Vol. V, pp. 582-83). The court informed counsel that it was finding that the defendant was acting under color of some law of the State of Oklahoma and that the jury would be so instructed. Id. at 587. The court also informed counsel that an instruction would be given that "[t]he liberty of the individual which the federal Constitution thus secures and protects includes freedom from unjustified intrusions on personal security including physical injury." Id. at 588.

The district court, following closing arguments by counsel, instructed the jury, *inter alia*, that:

> Plaintiffs claim that the defendant school district implemented a policy concerning the hiring, supervision and investigation of complaints concerning teacher sexual misconduct which showed deliberate indifference to the plaintiffs' constitutional rights. As a result of the alleged deprivation, plaintiffs claim that they sustained physical, emotional and monetary damages.
>
> The defendant denies that its actions

showed a policy of deliberate indifference to the complaints of sexual misconduct by teachers, either in hiring of teachers or in supervision of teachers.

The plaintiff [sic] also denies that its actions were the cause of the plaintiffs' injuries and claims that plaintiffs' injuries were caused by the criminal acts of Stephen Lee Epps.

(R., Supp. Vol. VI, pp. 661-62).

Further, the district court instructed:

[P]laintiffs' cause of action . . . against defendant is brought under Title 42, United States Code, Section 1983 which states: [recital of statute omitted]

In order to prove plaintiffs' claim the burden is upon the plaintiffs to establish by a preponderance of the evidence in the case the following facts:

First, that a policy making employee of the defendant, with responsibility for establishing final policy with respect to the subject matter in question, made a deliberate choice to follow a course of action, which through reckless disregard or deliberate indifference to the plaintiffs' rights, operated to deprive plaintiffs of one or more of plaintiffs' federal constitutional rights.

Second, that such defendant then and there acted under color of some law of the State of Oklahoma.

And third, that such policy was the moving

force behind the constitutional deprivation and consequent damage to the plaintiffs.

Id. at pp. 667-68.

The district court further instructed the jury that the Fourteenth Amendment to the federal Constitution provides that no state shall deprive any person of his liberty without due process of law, and that this includes freedom from unjustified intrusions on personal security including physical injury. Id. at 669.

The court instructed that, as a matter of law, Dr. Clayton and Principal Daniels were acting under color of state law, Id. at 670, and:

> You are further instructed that you need not determine whether Stephen Lee Epps was acting under color of state law at the time of the criminal acts which occurred. The issue in this case is not whether Epps was acting as an official of the state, but whether there was a policy in existence of the defendant which constituted deliberate indifference to or reckless disregard for the rights of the plaintiffs and, if so, whether such policy was the moving force behind a constitutional deprivation. Id. at 670-71.
>
> [Y]ou are instructed that the particular policy established by the defendant must be the moving force behind the constitutional violation and that plaintiffs must prove by a preponderance of the evidence that an affirmative link exists between that particular constitutional violation alleged and the policy.

Id. at 673.

Neither party lodged any objections to the instructions given.

In conjunction with the jury verdict awarding damages to the three plaintiffs, *supra*, the jury responded "yes" to each of the following special interrogatories:

> (1) Did the plaintiffs prove by a preponderance of the evidence that Dr. Clayton was the policy making employee of the defendant with the responsibiltiy for establishing final policy with respect to the hiring, investigation, and supervision of teachers at Terlton Elementary School? Yes.
>
> (2) Did the plaintiffs by a preponderance of the evidence [prove] that Dr. Clayton made a deliberate choice to follow a course of action which constituted a policy of reckless disregard or deliberate indifference to plaintiffs' rights? Yes.
>
> (3) Did plaintiffs prove by a preponderance of evidence that Principal Daniels was a policy making employee of the defendant with responsibility for establishing final policy with respect to investigation and supervision of teachers at Terlton Elementary School? Yes.
>
> (4) Did the plaintiffs prove by a preponderance of the evidence that Principal Daniels made a deliberate choice to follow a course of action which constituted a policy of reckless disregard or deliberate indifference to plaintiffs' rights? Yes.
>
> (5) Did the plaintiffs prove by a preponderance of the evidence that the policy

of the defendant was the moving force behind the deprivation of plaintiffs' constitutional rights? Yes.

(R., Supp. Vol. VI, pp. 679-80).

CONTENTIONS ON APPEAL

On appeal, the defendant contends that the judgement must be reversed because (1) there was no action taken "under color of law" required pursuant to 42 U.S.C. § 1983 because Epps was not acting under color of state law when he molested the plaintiffs, (2) the defendant School District may not be held liable because there was no "state action" involved when the plaintiffs were sexually molested by Epps, (3) the defendant School District did not have a policy of deliberate indifference or reckless disregard of the plaintiffs' rights, (4) any policy or custom adopted by the School District was not the moving force behind any deprivation of rights, (5) the plaintiffs were not deprived of a constitutionally protected right, and (6) the trial court erred in failing to direct a verdict for the School District.

I.

Appellant School District contends that the events giving rise to this litigation are not events for which the School District should be held responsible under U.S.C. § 1983, citing to *Paul v. Davis*, 424 U.S. 693 (1976) for the proposition that a plaintiff must show (1) that he has been deprived of a right secured by the Constitution of the United States, and (2) that such deprivation was achieved under color of state law. School District cites *United States v. Classic*, 313 U.S. 299, 326 (1941) wherein the Supreme Court defined action taken "under color of law" as

"[m]isuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." (Brief of Appellant, p. 10). The School District reasons that there was no state action involved in the events of June 13-14, 1984, when Epps molested the plaintiffs. Instead, argues the School District, "In point of fact, those events were the product of a private individual acting in his private capacity in connection with a private activity that the plaintiffs voluntarily and freely participated in as private individuals." (Reply Brief of Appellant, No. 88-1619, p. 10). We agree.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunitites secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Acts of a state officer in the ambit of his personal pursuits are not acts under color of state law. *Screws v. United States,* 325 U.S. 91 (1945). A state, its agencies or officials may not be assessed liability for the acts of a private individual, except by a "fair attribution" of those actions to the State. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 936-37 (1982). It is uncontested in our case that on June 13-14, 1984, Epps was under no obligation to the School District. He was then on his free or summer "vacation." As such, he had no duties or obligations owing to or functions to perform for the School

District. His contract required only that he teach fifth grade and coach boys' basketball at Terlton Elementary School commencing late August and continuing to the end of May of each school year. Principal Daniels made it plain to Epps that any and all activities associated with summer basketball camps were not school related.

Beyond this, the thread connecting the School District to the 1984 summer basketball camp to be held at Cleveland High School under the sponsorship, control, and management of Coach Warden, under a contract arrangement, was much too thin to constitute the basketball camp a sponsored activity of the School District. The only affirmative connections are to be found in: (a) the resolution adopted by the School District approving the use by Coach Warden of the Cleveland High School facilities for the conduct of the basketball camp, (b) the permitted distribution of fliers or notices concerning the summer camp among the school children attending Terlton Elementary School, and (c) the consented use of the outside basketball court by parents, children and others interested in raising funds for children who could not otherwise afford the cost of attending the summer basketball camps.

The above scenario involving the summer basketball camp constitutes the only possible nexus tying the School District to the off-duty, private action taken by Epps to organize the June 13-14, 1984, meeting with the plaintiffs to sell candy in order to raise money for the summer basketball camp. There is no argument that Epps was not under any obligation or duty to the School District during the "summer" vacation. No contention is made that

the School District even knew that Epps and the plaintiffs planned the candy selling activities.

The obvious purpose of Congress in the enactment of § 1983 was to provide a remedy to parties deprived of constitutional rights by a state official's abuse of his position while acting under color of state law. The deprivation in the case at bar involved the sexual molestation actions practiced by Epps upon the plaintiffs June 13-14, 1984. It is a given that the School District cannot be liable to the plaintiffs for Epps' actions on a *respondeat superior* theory. *Monell v. Department of Social Services,* 436 U.S. 658 (1978). That case provides that a municipality is liable for constitutional torts only if the alleged unconstitutional acts implement a policy, ordinance or custom of the local government. Id. at 694 ("[i]t is when execution of a government's policy or custom . . . inflicts the injury that the government as an entity is responsible under § 1983.")

In *Rizzo v. Goode,* 423 U.S. 362 (1976), the Supreme Court held that municipalities and their supervisory personnel are not liable for civil rights violations caused by individual police officers employed by the municipalities unless the plaintiff demonstrates "[a]n affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy —express or otherwise—*showing their authorization or approval of such misconduct.*" Id. at 371. (Emphasis supplied). In other words, it is the obligation of the plaintiff to prove that there exists a direct nexus between the constitutional torts (here the acts of sexual molestation practiced by Epps upon the plaintiffs on June 13-14, 1984) and the School District's authorization or approval thereof, either

expressly or otherwise, by the adoption of any plan or policy. In the instant case, there is absolutely nothing in the record demonstrating that the School District had any control over Epps during the summer months. Epps had no duties or obligations to perform on behalf of the School District during the summer months. Further, the School District did not sponsor or approve the activities undertaken by Epps and the plaintiffs on June 13-14, 1984, i.e., to sell candy in order to raise money for attendance at the summer basketball camp.

The district court permitted the jury to treat the School District's procedure in hiring teachers as the "policy" which, if found to be so wanting in its investigative methods in Epps' case as to demonstrate reckless disregard or deliberate indifference to the plaintiffs' constitutional rights, to serve as the required "nexus." Thus, under the court's instructions, Dr. Clayton and Principal Daniels—and not Epps—were the "state actors" on June 13-14, 1984, and the issue for the jury resolution was whether their conduct (and accordingly that of the School District) in the procedure employed in the investigation, hiring, and supervision of Epps as a teacher and coach at Terlton Elementary School was the affirmative link required under *Rizzo v. Goode, supra.* We hold that the district court clearly erred in so instructing.

Epps was, on June 13-14, 1984, acting in a status similar to that of an "off duty" policemen, except that Epps was absolutely free from all obligation or duty to School District. Thus, the "nexus" is much more tenuous in this case than that of an "off duty" police officer. We reject plaintiffs' contention that the deprivations in this case are fairly attributable to

state law because of the "cloak of authority" held by a teacher: "This authority is not limited to the classroom or to the school year, but rather, in the case of a coach, extend to extra curricular activities. Just as a policeman is the legal authority figure for adults, a teacher represents the first authority figure to young children." (Brief of Appellee, No. 88-1619, p. 8). If the "extra curricular" activity had a real "nexus" to the duties and obligations owing by Epps to School District, we would agree with plaintiffs. However, such is simply not the case. Here, the plaintiffs voluntarily participated with Epps in basketball camp fundraising activities which were not related to school activities, and thus, not undertaken under color of state law.

The School District could be held liable in this case under § 1983 only if plaintiffs demonstrated a *direct causal connection* between the hiring, investigative, and supervising policy in question and the alleged constitutional deprivation. *City of Canton, Ohio v. Harris,* ___ U.S. ___, 109 S. Ct. 1197 (1989) ("Moreover, for liability to attach in this circumstance the identified deficiency in the city's [police] training program [policy] must be *closely related to the ultimate injury.* Thus, in the case at hand, respondent must still prove that the deficiency in training actually caused the police officers' indifference to her medical needs." 109 S. Ct. at 1206.) (emphasis supplied).

In Springfield v. Kibbe, 480 U.S. 257, 267, 268 (1987) (O'Connor, J., dissenting) observed:

> Given the importance, under § 1983, of distinguishing between direct and vicarious liability, the Court repeatedly has stressed the

need to find a direct causal connection between municipal conduct and the constitutional deprivation. See *e.g., Oklahoma City v. Tuttle,* 471 U.S. at 824-25, n. 8 (requiring 'affirmative link' between municipal policy and constitutional violation); *Polk County v. Dodson,* 454 U.S. 312 (1981) (municipal policy must be the 'moving force' behind constitutional deprivation) . . . When the execution of municipal policy does not compel a constitutional violation, however, the causal connection between municipal policy and the deprivation of constitutional rights becomes more difficult to discern. In some sense, of course, almost any injury inflicted by a municipal agent or employee ultimately can be traced to municipal policy.

Where a claim is based on the Due Process Clause of the Fourteenth Amendment (as here), the Supreme Court has held that such does not transform every tort committed by a state actor into a constitutional violation. *Daniels v. Williams,* 474 U.S. 327, 335-36 (1986) ("Jailers may owe a special duty of care to those in their custody under state law, see Restatement (Second) of Torts § 314A(4) (1965), but for the reasons previously stated we reject the contention that the Due Process Clause of the Fourteenth Amendment embraces such a tort law concept."); *Martinez v. California,* 444 U.S. 277, 285 (1980) ("Her life was taken by the parolee five months after his release . . . the parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger . . . we do hold that at least under the particular circumstances of this parole decision, appellants'

decedent's death is too remote a consequence of the parole officers' action to hold them repsonsible under the federal civil rights law.") Baker v. McCollan, 443 U.S. 137, 146 (1979) (holding that the tort of false imprisonment does not become a violation of the Due Process Clause of the Fourteenth Amendment simply because the defendant is a state official and that "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law."); *Paul v. Davis*, 424 U.S. 693, 701 (1976) ("Rather, he apparently believes that the Fourteenth Amendment's Due Process Clause should *ex proprio vigore* extend to him a right to be free of injury whenever the state may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states.").

In *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986), the Supreme Court observed that the touchstone for determining "official policy" is by distinguishing "acts of the municipality from acts of employees of the municipality, and thereby making clear that municipal liability is limited to action for which the municipality is actually responsibile." And *Pembaur* makes it clear that the policy must be a deliberate choice of action "*with respect to the subject matter in question.*" Id. at 483-84. (Emphasis supplied). The subject matter "in question" in the instant case is the alleged deprivation of constitutional rights of the plaintiffs (rights of liberty and privacy) which occurred June 13-14, 1984.

In *City of St. Louis v. Praprotnik*[1], *supra*, a plurality of the Supreme Court held that a municipality cannot be liable under § 1983 unless the final policy maker, as identified by statute (in our case Dr. Clayton or Dr. Clayton and Principal Daniels) is the one who takes the unconstitutional action. In the instant case, there can be no question but that the "unconstitutional action" charged against the defendants were the coerced acts of sexual molestation practiced upon the plaintiffs by Epps on June 13-14, 1984, alleged by plaintiffs to have resulted by virtue of the School District's willful disregard or deliberate indifference to the plaintiffs evidenced in its policy of hiring, investigation, and supervison of Epps, which plaintiff's pleaded to have established "[a] causal connections between the acts of Epps and the conduct of District." (R., Supp. Vol. I, Tab I, Complaint, p. 7). Like the Supreme Court holding in *Martinez v. California, supra*, we hold that the acts of molestation practiced by Epps upon the plaintiffs on June 13-14, 1984, constituted too remote a conse-

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1. In *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) (plurality opinion), the Supreme Court held that the trial court must identify those officials who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the alleged constitutional deprivation or violation. Once the court has identified those officials who have the authority to make official policy decisions, it is then the duty of the jury to determine whether those policy decisions caused the deprivation of constitutional rights. In the case at bar, the district court, without the benefit of *Praprotnik*, permitted the jury to make both findings/determinations. This was error. However, no objections were lodged and, in our view, that error was harmless because the court specially instructed that Dr. Clayton and Prinicipal Daniels were acting under color of state law.

quence of the 1981 hiring and investigation policy to impose liability upon the School District under the civil rights law.

In Stoneking v. Bradford Area School Dist., 882 F.2d 720 (3rd Cir. 1989), the court held that a former female high school student who had been sexually abused and forced to engage in various sexual acts during her entire high school years and thereafter by the band director of the school, some of which acts occurred in the band room and on trips for band functions, could maintain a 42 U.S.C. § 1983 civil rights action against the school district and certain of its officials for damages. The court distinguished *Stoneking* from *DeShaney v. Winnegago County Department of Social Services*, ____ U.S. ____, 109 S. Ct. 998, 103 L. Ed.2d 249 (1989) in one significant aspect, i.e., "[T]he principal distinction between DeShaney's situation and that of Stoneking is that DeShaney's injuries resulted at the hands of a private actor, whereas Stoneking's resulted from the actions of a state employee." Id. at 724.

The Court was careful to point out that the band director was a school district employee subject to its control during the performance of his official duties and that "[m]any of Wright's interactions with Stoneking occurred in the course of his performance of his official responsibilities, such as during school-sponsored events and trips, and sometimes on school property." Id. Liability of the school district was claimed by reason of "[t]heir own actions in adopting and maintaining a practice, custom or policy of reckless indifference to instances of known or suspected sexual abuse of students by teachers, in concealing complaints of abuse, and in discouraging students' complaints about such conduct." Id. at

724-25. The evidence supported these contentions.

Between 1978 and 1982, the principal and assistant principal in *Stoneking* had received at least five complaints about sexual assaults of female students by teachers and staff members which were repressed and concealed. On that foundation, the court held that it is for a jury to determine whether there was a casual relationship between the school district's practices, customs or policies and the repeated sexual assaults in the case. The court affirmed the district court's denial of a motion for summary judgment filed by the school principal and assistant principal. Significantly, however, the court reversed the district court's denial of a motion for qualified immunity filed by Frederick Shuey, the superintendent of the school district:

> [W]e must conclude, in light of our precedent, that Stoneking's claims against Shuey amount to mere "inaction and insensitivity" on his part . . . We cannot discern from the record any affirmative acts by Shuey on which Stoneking can base a claim of toleration, condonation or encouragement of sexual harassment by teachers which occurred in one of the various schools within his district.

Id. at 731.

Comparing the facts of the case at bar with *Stoneking* leads to the inescapable conclusion that for purposes of liabiltiy there is no comparison. In *Stoneking*, the court had no difficulty determining that the sexual acts practiced by the band director during school hours and on school business were those of a state actor. Such cannot be said of Epps' status when he practiced the child molestation charged in our case. Futhermore, there is no

evidence that Dr. Clayton or Principal Daniels ever concealed or attempted to coverup any child abuse actions against school children. Nor is there any evidence that either were ever aware of any child molestation acts committed by Epps (beyond the report from Mrs. Kelley) or other sexual improprieties on Epps' part until the June 13-14, 1984, incidents, which occurred away from school property and in relation to an activity unrelated to school sponsorship. It is significant that the *Stoneking* court found, for causation purposes, that the school district policy had to relate specifically to toleration, condonation or encouragement of sexual harassment.

Our case is much more akin factually to those actions brought under 42 U.S.C. § 1983 involving acts of an off-duty police officer during private employment as a security guard. However, even this comparison is tenuous because in our case Epps did not, on June 13-14, 1984, perform any duties or functions as a teacher or coach and he was completely free of any and all contractual obligations to the School District.

In Travers v. Meshriy, 627 F2d 934 (9th Cir. 1980), the court affirmed a judgment awarding damages to a bank customer who brought a 42 U.S.C. § 1983 action against the bank and its employees alleging false imprisonment, assault, slander, and intentional infliction of emotional distress resulting from his detention by an off-duty policeman employed by the bank. The court held that there was sufficient state involvement in Officer Gibson's actions to render them "under color of state law:"

> [G]ibson himself testified that he responded to Meshriy's [a bank supervisor] call as a police

> officer rather than as a bank employee. Furthermore, it was established at trial that using off-duty police officers as "security tellers" at the bank was part of a police department "secondary hiring" program, and that the police department selected the officers for the program. An officer who had been instrumental in establishing the program testified that if an officer believed a crime had been committed, or was directed by a bank officer to stop an individual, his or her primary duty was to the department, not to the bank. Gibson flashed his police identification at Traver, moreover, and introduced himself as a police officer before instructing Traver to sit down on the platform. All these indicia of state action compel the conclusion that Gibson was acting "under color of state law" when he responded to Meshriy's call for help.

Id. at 938.

We observe that none of the indicia set forth in *Travers v. Meshriy* leading to the conclusion that there was sufficient state involvement to render Officer Gibson's actions as taken under "color of state law" apply in the instant case. To the contrary, there is no evidence showing that the School District lent any sponsorship or encouragement to the actions taken by Epps on June 13-14, 1984, to enlist the plaintiffs in an effort to raise money for summer basketball camp. As such, Epps could not have been considered to be acting as a teacher or basketball coach because the incident occurred during his summer vacation from any school duties.

In Robinson v. Davis, 447 F.2d 753 (4th Cir.), *cert.*

denied, 405 U.S. 979 (1971), some part-time town police officers and part-time campus security officers were held not to have acted under "color of state law" for 42 U.S.C. § 1983 purposes when they requested that students attend a college administrative hearing because, although wearing their official police uniforms, the plaintiffs-students summoned by the security officers were cognizant that those individual were fellow students acting as security officers. Insofar as the municipality was concerned, the court held that "[T]he elements of control over, involvement in and direct responsibility for the actions of the private party [the security officers] present in *Burton [Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961)] are lacking here." Id. at 757-58.

In *Watkins v. Oaklawn Jockey Club*, 183 F.2d 440 (8th Cir. 1950), the court held that an off-duty sheriff and his deputy did not act under color of state law for purposes of maintaining an action of false arrest and imprisonment under 42 U.S.C. § 1983 when the deputy, upon orders of the president of the race track and the sheriff, ejected the plaintiff from the track. The court deemed it significant that the deputy did not arrest the plaintiff and that he simply stated to the plaintiff that he was to be ejected, thereupon escorting him to the gate. The court placed particular emphasis on the fact that the sheriff and the deputy were acting only in the ambit of their personal pursuits and that they were not performing any duty imposed upon them by the state.

In Crowder v. Jackson, 527 F. Supp. 1004 (W.D. Pa. 1981), the court held that plaintiff's 42 U.S.C. § 1983 claim against a municipality must fail where plaintiff was allegedly beaten by an off-duty

policeman working as a security guard at a grocery store. The complaint alleged that the municipality allowed its policeman to "moonlight" in uniform as security officers and that it failed to properly train them. The court cited to *Rizzo v. Goode*, 423 U.S. 362 (1976) where the court observed that plaintiff had failed to show "an affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy—express or otherwise—showing their authorization or approval of such misconduct." 423 U.S. at 371. The court held:

> Plaintiff's naked allegations regarding the Borough's failure to train its employees, and permitting its police officers to "moonlight" are insufficient since there is no foundation for the required showing that the Borough authorized, approved, or was indifferent to Mr. Jackson's action. The plaintiff's theory of municipal liability under section 1983, therefore must fail.

527 F. Supp. at 1006.

We hold that the district court erred, as a matter of law, in submitting the issue of School District's liability to plaintiffs under 42 U.S.C. § 1983 for the child molestation acts committed by Epps on June 13-14, 1984. We hold that there was no state action involved when the plaintiffs were molested by Epps; Epps was not acting under color of state law when he molested the plaintiffs; the policy or custom of School District relative to its procedure in the investigation, hiring and supervision of teachers was not the "moving force" behind the alleged deprivation of plaintiffs' constitutionally protected

rights; and the district court erred in failing to grant School District's motion for a directed verdict at the close of all of the evidence, or in the alternative, in denying School District's motion for judgment notwithstanding the verdict. In so holding, we have viewed the evidence and all reasonable inferences therefrom in the light most favorable to the plaintiffs. *See Richardson v. City of Albuquerque,* 857 F.2d 727, 731 (10th Cir. 1988).

II.

School District argues that the district court erred in submitting to the jury the issue whether the School District's policy or custom—i.e., its established procedure in investigating, hiring and supervision of teacher—constituted deliberate indifference to or reckless disregard for the rights of the plaintiffs and, if so, whether such policy was the moving force behind a constitutional deprivation. We agree.

In Oklahoma City v. Tuttle, 471 U.S. 808, 824 n. 7 (1985), the Supreme Court observed that "[i]t is an open question whether a policymaker's 'gross negligence' in establishing police training practices could establish a 'policy' that constitutes a 'moving force' behind subsequent unconstitutional conduct, or whether a more conscious decision on the part of the policymaker would be required." Even so, the Court repeated the necessity of finding a direct causal connection between the municipal conduct (policy) and the constitutional deprivation. Id. at 824-25, n. 8 (requiring an "affirmative link.") *See also Polk County V. Dodson,* 454 U.S. 312 (1981) (policy must be the "moving force" behind the constitutional deprivation).

In *City of Canton, Ohio v. Harris, supra,* the Supreme Court held that municipal liability under § 1983 attaches where city policy makers elect deliberately to follow a course of action from among various alternatives (there, a training program for its police officers) which is so inadequate that the policymakers acted deliberately indifferent to a specific need leading to the violation of constitutional rights. Furthermore, the Court spoke of the nexus between the condemned "policy" and the ultimate injury, i.e., that the policy must actually cause the alleged injury:

> Moreover, for liability to attach in this circumstance the identified deficiency in a city's training program must be closely related to the ultimate injury, thus in the case at hand, respondent must still prove that the deficiency in training actually caused the police officers' indifference to her medical needs . . .
>
> * * *
>
> To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983 . . . [and which would permit] . . . cases against cities for their 'failure to train' employees to go forward under § 1983 on a lesser standard of fault [which] would result in *de facto respondeat superior* liability on municipalities—a result we rejected in *Monell,* 4 36 U.S. at 693-94 . . . claims . . . alleging that the city's failure to provide training to municipal employees . . . can only yield liability against a municipality where the city's failure to train reflects *deliberate indifference to the constitutional*

rights of its inhabitants.

109 S. Ct. at pp. 1206-07.

Under the standard of negligence mandated by *City of Canton, Ohio v. Harris, supra,* i.e., that a consciously adopted "policy" (here the established procedure of the School District in the investigation, hiring and supervision of teachers) must, in a causal sense, reflect deliberate indifference to the constitutional rights of plaintiffs, we must hold that the evidence in this case is simply insufficient to demonstrate that the School District's policy reflected a reckless disregard or deliberate indifference to the alleged constitutional rights of the plaintiffs violated by Epps on June 13-14, 1984. It is by hindsight that the need to make inquiries of law enforcement agencies concerning an applicant's felony record rather than relying on the fact that a teacher convicted of a felony is not entitled to have a teaching certificate in the State of Oklahoma seems clear. Nothing done or undone by Dr. Clayton or Principal Daniels, however, could give rise to deliberate indifference to the constitutional rights of the plaintiffs. "If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior.*" *City of St. Louis v. Praprotnik,* 485 U.S. at 126.

This court has applied the "deliberate indifference" standard in many civil rights cases, although sometimes positing it in terms of reckless disregard or gross negligence. In all cases, we have applied a much more stringent test than ordinary negligence. In *Garcia v. Salt Lake County,* 768 F.2d 303 (10th Cir. 1985), we applied the "deliberate indifference" test in a 42 U.S.C. § 1983 action brought against Salt Lake

County and certain of its officials, on a claim that its official policies, practices and customs were deliberately indifferent to serious medical needs of persons confined in the county jail before conviction and were violative of the Eighth Amendment. We there held that:

> Deliberate indifference to serious medical needs may be shown by proving there are such gross deficiencies in staffing, facilities, equipment, or procedures that the inmate is effectively denied access to adequate medical care. *See Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041, 101 S. Ct. 1759, 68 L. Ed.2d 239 (1981) . . .

Id. at 308.

See also: *Ware v. Unified School District 492, Butler County, Kansas*, (10th Cir. 1989) (In § 1983 action in which it was alleged that a school district's secretary was terminated because she exercised constitutionally protected speech, held that a direct causal link must be demonstrated between acts of the governing body and the alleged constitutional deprivation and that the governing body exercised its decision-making authority with deliberate indifference to the protected constitutional rights); *Starrett v. Wadley*, 876 F.2d 808 (10th Cir. 1989) (In a Title VII and § 1983 sexual harassment case, held that Wadley, the former county assessor, was the final policy maker in regard to the termination of plaintiff Starrett; however, by contrast, held that Wadley's acts of sexual harassment, separate from the firing, did not constitute official policy, and, on that basis, the district court erred in denying the county's motion for judgment n.o.v.); *Specht v. Jensen*, 863 F.2d 700 (10th Cir. 1988) (Where city was sued

in a § 1983 action for damages resulting from alleged illegal search of a home and office based on failure to supervise or train police officers, held that there was no evidence tending to show deliberate indifference); *Blankenship v. Meachum,* 840 F.2d 741 (10th Cir. 1988) (Federal inmate brought § 1983 suit alleging that prison officials placed him in the general prison population, resulting in attacks by an unknown inmate and serious injuries; held that to rise to level of Eighth Amendment violation, failure of prison officials to protect inmates must be wanton, not inadvertent or error in good faith); *Meade v. Grubbs,* 841 F.2d 1512 (10th Cir. 1988) (Municipality may be held liable under § 1983 for excessive use of force by police officers where there is essentially complete failure to train, or training so reckless or grossly negligent that future misconduct is almost inevitable).

In reviewing a denial of a motion for judgment notwithstanding the verdict, such denial is error "[o]nly when the evidence points but one way and is susceptible to no reasonable inferences sustaining the position of the party against whom the motion is made." *Cooper v. Asplundh Tree Expert Co.,* 836 F.2d 1544, 1547 (10th Cir. 1988). And our review of a denial of a motion for a new trial focuses on whether the "[v]erdict is clearly, decidedly, or overwhelmingly against the weight of the evidence." *Champion Home Builder v. Shumate,* 388 F.2d 806, 808 (10th Cir. 1967).

We hold that, as a matter of law, the evidence in the case at hand was insufficient to establish that the School District's policy of investigating, hiring and supervising teachers was so wanting that it constituted deliberate indifference or reckless

disregard for the constitutional rights of the plaintiffs. The district court erred in denying the School District's motion for directed verdict at the close of all of the evidence, or, in the alternative, in denying School District's motion for judgement notwithstanding the verdict.

We REVERSE.

Frank A. Zeigler, P.C.
ATTORNEY AT LAW

October 11, 1989

Mr. Robert L. Hoecker
Clerk of the Court
U.S. Court of Appeals
Tenth Circuit
404 U.S. Courthouse
Denver, Colorado 80294

Re: 88-1619
Oral Argument 11/14/89
Boulder, Colorado

Dear Mr. Hoecker:

This letter is respectfully submitted pursuant to Fed. R. App.P. 28 (j). Appellees have become aware of significant authority handed down February 22, 1989, by the Supreme Court of the United State which was unavailable when Briefs were submitted.

The style of the authority is *DeShaney v. Winnebago County Department of Social Services,* 109 S.Ct. 998; cert granted 1008 S.Ct. 1218.

Appelles wish to insert the above authority at Page 12 of the Brief for Appellees under the Proposition arguing State Action.

The discussion in *DeShaney* on the "affirmative duty to protect" is analogous to the School District's special relationship with Appellees and the case is also instructive on the broader issue of child abuse liability.

Very truly yours,

Frank A. Zeigler

FAZ/jab
cc: James K. Secrest II
Attorney for Appellant

1023 WEST 23rd STREET TULSA, OK 74107 (918)584-5199

Frank A. Zeigler, P.C.
ATTORNEY AT LAW

December 7, 1989

Mr. Robert L. Hoecker, Clerk
United States Court of Appeals
for the Tenth Circuit
404 United States Courthouse
1929 Stout Street
Denver, Colorado 80294

Re: Appeal No. 88-1619. D.T. v. Independent School Dist. No. I-6

Dear Mr. Hoecker:

Pursuant to Rule 28(j), of Fed. R. App. P., the Appellee would like to call the Court's attention to the following case which was not available for citation at the time of the Briefing or oral argument on November 15, 1989:

Stoneking v. Bradford Area School District, 882 F.2 720 (3rd Cir. 1989) Decided Aug. 16, 1989.

Appellee offers the following statement as to the relevance of this case along with the pages of its Brief to which this citation applies.

Stoneking represents the first decisional law relevant to school district liability in child abuse and also interprets the holding in *DeShaney v. Winnebago County*, 409 U.S. _____, 109 S.Ct. 998, 103 L.Ed.2d. 249 (1989) which was also submitted by Appellee under Fed. R. App. P. 28 (J) on October 11, 1989.

Stoneking is instructive to Appellee's Brief and discussion at oral argument November 15, 1989, in the following particulars:

1. Its' facts are very similar to the instant case involving a band director where substantial notice had been provided to the school district on his criminal conduct and most of the abuse took place after school hours and off school property. See Brief for Appellees, Statement of Facts pages 1-6.

2. *Stoneking* is relevant to state action (see Brief for Appellee pages 9-12) in drawing a distinction between the holding in *DeShaney,* where violence results at the hands of a private actor; and where injuries occur at the hands of a state employee who is a teacher and coach and is on the payroll on a yearly basis. See Trial Transcript page 402.

The Court offered the following observation in *Stoneking* at 724:

> "It is immaterial for this purpose whether Wright's sexually abuse is viewed as attributable to the state. This consideration would be relevant had Stone King sued Wright under Section 1983, alleging that he acted under color of state law. She did not. Instead the suit is against the School District and its supervisory officials, and they were uncontestibly acting under of state law"

3. *Stoneking* establishes precedent left open by *DeShaney* in extending affirmative protection to children in the mandated school environment. This aspect of the *Stoneking* is relevant to Appellees' Brief pages 20-22.

4. *Stoneking* provides an independent basis for liability unrelated to *DeShaney* "for policies chosen and recklessly maintained" which are not dependent upon the existence of a special relationship. This authority is instructive to Appellees' Brief pages 13-15.

Respectfully submitted,

Frank A. Zeigler

ATTORNEY AT LAW
1023 WEST 23rd STREET - TULSA, OK 74107 (918)584-5199

No. 89-1834

In The

Supreme Court of the United States

October Term, 1989

D.T., a minor, by his legally appointed guardians, M.T. and K.T., as parents and legal guardians of D.T.; F.H., Jr., a minor, by his legally appointed guardians, F.H. and L.H., as parents and legal guardians of F.H., Jr.; P.M., a minor, by his legally appointed guardian, R.T., as parent and legal guardian of P.M.,

Petitioners,

vs.

INDEPENDENT SCHOOL DISTRICT NO. I-6 of Pawnee County, Oklahoma,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeal For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a violation of substantive due process arises from a sexual assault by a teacher occurring in connection with students' voluntary participation in a privately sponsored activity on private property during summer vacation, when an earlier investigation by local school officials could not substantiate rumors of sexual misconduct (but did not uncover a ten year old conviction in another state antedating the perpetrator's teaching career in both states)?

2. Whether a sexual assault by a teacher occurring in connection with the voluntary participation by students in a privately sponsored activity on private property during summer vacation involves state action by the school district when an earlier investigation by local school officials could not substantiate rumors of sexual misconduct by the teacher (but did not uncover a ten year old conviction in another state antedating the perpetrator's teaching career in both states)?

3. Whether a school district's objectively reasonable investigation of rumors of sexual misconduct by a teacher that finds no substance to the rumors (but fails to uncover a ten year old conviction in another state) constitutes an unconstitutional "policy" that is the "moving force" behind a sexual assault occurring in the course of voluntary participation by students in a privately sponsored activity on private property during summer vacation?

LIST OF PARTIES

Petitioners, listed only by their initials in the style of this case are: Daniel Tilley (D.T.), a minor child, and his natural parents, Michael Tilley (M.T.), and Kay Tilley (K.T); Floyd Hightower, Jr. (F.H., Jr.), a minor child, and his natural parents, Floyd Hightower (F.H.) and Linda Hightower (L.H.); and Paul Miller (P.M.), and his natural mother, Rebecca Taylor (R.T.).

Respondent is the Independent School District No. I-6 of Pawnee County, Oklahoma (also known as the Cleveland Public Schools). In their list of parties in the Petition for Writ of Certiorari, Petitioners have named the current members of the Respondent's School Board (Joseph Cole, Mathew Ringold, Allen Potter, John Giddens, and Donald Topping), but these individuals have never been "parties" to this litigation in either their individual or representative capacities.

These parties were the same on appeal to the United States Court of Appeals for the Tenth Circuit.

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STATEMENT OF THE CASE

In the summer of 1981, the Respondent, Independent School District No. I-6 of Pawnee County [hereinafter School District] hired a new teacher, Stephen Lee Epps. Mr. Epps was an experienced teacher and came highly recommended from his previous employers. From August, 1972 until June of 1977, Mr. Epps was a fourth and fifth grade elementary teacher in Lancaster, Texas. (Trial transcript, Vol. IV, pp. 495-496). In 1977, Mr. Epps voluntarily left Texas and came to Oklahoma, where he was employed by school districts in Drumright and Wann, Oklahoma, until hired for the position with the Terlton School of the Cleveland Public Schools. It is undisputed that Mr. Epps was hired pursuant to normal procedures, which included a review of his credentials as supplied by Oklahoma State University. (Trial transcript, Vol. I, pp. 75, 80-81; Vol. II, pp. 160-161). Under Oklahoma Law, an individual who has been convicted of a felony may not hold a teaching certificate. In hiring teachers, the school district relied upon the certification process, and did not specifically make independent inquiries regarding possible prior arrests or convictions. (Trial transcript, Vol. I, p. 76; Vol. II, pp. 111, 160; Vol. III, p. 445). There is no national clearing house by which to check for convictions occurring in other states. (Trial transcript, Vol. IV, p. 510).

In August, 1981 (after Epps had already been hired), the Superintendent, Dr. Charles Clayton received a phone call from a woman in Arizona (later identified as Diane Kelley), who claimed that Epps had tried to molest her son and that he had been fired from his teaching position in Texas (as related to her by her mother). Dr. Clayton

said he would look into it. (Trial transcript, Vol. I, pp. 114-118). A phone call to the Texas School District established that Epps had not been fired, but had resigned voluntarily. Dr. Clayton was informed that Epps was considered a good teacher by his Texas School and could have continued to work there had he so wished. (Trial transcript, Vol. II, pp. 119-124; Vol. III, pp. 494-497). Dr. Clayton also called Mr. Epps' former principal in Drumright, Oklahoma, who stated he had in fact recommended Epps for reemployment at his school, and that although he had heard some rumors, he could not substantiate them. (Trial transcript, Vol. II, p. 150).

Aware of the gravity of the allegation, Dr. Clayton contacted Mr. Daniels, the principal of Epps' school, and directed him both to confront Epps about the accusation and to watch Epps closely. (Trial transcript, Vol. II, p. 112; Vol. III, pp. 359-60). When confronted, Epps denied the accusation, denied being a homosexual, and suggested that the caller was angry with him for returning to Oklahoma instead of staying with her. (Trial transcript, Vol. III, pp. 377-381). Mr. Daniels did in fact observe Epps closely (including spontaneous visits to his classroom and watching his behavior at basketball games), but saw nothing unusual in his behavior with children. (Trial transcript, Vol. III, pp. 360-362). Mr. Daniels also filled out six semi-annual reports in which Epps was given high ratings. (Trial transcript, Vol. III, pp. 363-369; plaintiff's Exhibit 8).

Contrary to the assertion of Petitioners, Charlotte Johnson was not acting as "a representative of some parents" when she discussed Epps with Mr. Daniels in the fall of 1981. *See* Petition for Writ of Certiorari, p. 3.

Mrs. Johnson specifically testified that her conversation with Mr. Daniels related to "rumors" that she "had heard" that Epps was "gay or whatever." (Transcript, Vol. II, p. 216, ll. 9-10, 23-24). Mrs. Johnson related to Mr. Daniels no details which could be pursued or verified. (Trial transcript, Vol. III, pp. 450-451).

Petitioners also mention Debbie Hewitt, who in May of 1982 (i.e., towards the end of Epps' first year as a teacher at the Terlton School) asked Mr. Daniels about "rumors." Her exact testimony was as follows:

> I just told him [Mr. Daniels] that I had heard rumors and that Mr. Epps was wanting to spend some time with my son and I did not know if there was any substance to the rumors, and I couldn't imagine him being in the school system if he was, you know. And he said that he would find out what he could.

(Transcript, Vol. III, p. 354, ll. 11-16). Clearly, Mrs. Hewitt was *inquiring* about *rumors*; she definitely was not reporting an incident. Similarly, only rumors (and no details or substance) were all that ever came to the attention of Peggy Pruitt. (Transcript, Vol. II, p. 147).

Walter Potts, the school custodian, testified that he told Mr. Daniels what an unidentified worker had told him about Epps. Mr. Potts conducted no independent investigation of his own, and conveyed no specific information to Mr. Daniels other than the claim that Epps had been "run . . . out of Drumright . . . " (Trial transcript, Vol. II, p. 193, ll. 6-11; pp. 192-195). Dr. Clayton already established that Epps had not been "run out of Drumright" but had in fact been recommended for rehiring. (Trial transcript, Vol. II, pp. 150-151).

The whole question of "notice" as argued by petitioners reduces to a series of unsubstantiatable rumors circulating and recirculating during Epps' first year as a teacher with Terlton School. The only specific claims that could be verified turned out to be false. Epps taught at the Terlton School for the academic years 1981-1982, 1982-1983, 1983-1984, and during that period, nothing occurred suggesting there was any substance to the rumors that accompanied Epps' initial hiring. (Trial transcript, Vol. III, pp. 392, 454-455). No incidents were brought to the school board's attention during the years 1982-1983, or 1983-1984, although parents had ready access to school authorities. (Trial transcript, Vol. II, pp. 151-152).

When school ended in May, 1984, Epps' duties to the School District and authority as a teacher ceased, and would not resume for another three months, towards the end of August. (Trial transcript, Vol. III, pp. 467-468). In May, Epps received his final salary checks, which could be cashed immediately. (Trial transcript, Vol. III, pp. 402-403, 468). During the summer months, the school would have no direct authority over students; it never had authority over parents. (Trial transcript, Vol. III, p. 402). On June 13, 1984, (after school had let out for the year) Epps took three former students to sell candy at shopping centers in the cities of Sand Springs and Tulsa, Oklahoma, as a way to raise money for a privately sponsored basketball camp to be held that summer. Afterwards, Epps offered to take the students swimming at the house of a friend. Each of the students contacted his parents and obtained permission both to accompany Epps to his friend's house, and to spend the night with

him. During the night, Epps molested the children. Although tragic, these events occurred on private property, in connection with a private activity and during summer vacation at a time when Epps had no duties as a teacher and no authority over the children.

The lack of school involvement in the basketball camp cannot be overemphasized. The School District never sanctioned, sponsored, or approved any fund raising activities in connection with summer athletic camps for elementary students. However, outdoor facilities, such as a football field, have been used in connection with these privately sponsored camps. (*Id.*) *Several different camps* were available to students for the summer. Most of the evidence did not relate specifically to any one camp or to a camp in which the students were involved. For example, a fund raising basketball game was held on the outdoor court of the Terlton School in order to raise money to help students attend the camp of their choice (not any one particular camp). Fund raising was not a school sponsored activity, and Epps' participation in those activities was purely voluntary. (Trial transcript, Vol. IV, p. 400). No particular approval would be needed to use outdoor facilities, and in fact, these were commonly left open to the general public (including adults) as there was no public park in Terlton. (Trial transcript, Vol. III, pp. 459-460).

On March 4, 1985, the underlying action was filed in the United States District Court for the Northern District of Oklahoma. Both Epps and the School District were named as defendants. Claims were asserted on behalf of Petitioners and also their parents pursuant to 20 U.S.C. Section 1681 and 42 U.S.C. Section 1983. No service was

obtained upon Epps, and Petitioners' claim against Epps was dismissed by Order of June 17, 1986.

From the very inception of this lawsuit, the School District has contended that Petitioners do not have a claim for violation of constitutional rights under color of law based upon the events of June, 1984. By Order dated September 10, 1986 and filed October 23, 1986, the trial court dismissed Petitioners' claims pursuant to 20 U.S.C. Section 1681; dismissed the Petitioner's parent's claims pursuant to both 20 U.S.C. Section 1681 and 42 U.S.C. Section 1983; and dismissed Petitioners' claim for punitive damages. The only remaining claim was pursuant to 42 U.S.C. Section 1983.

Petitioners' claim was tried to a jury on October 19 through October 23, 1987. At the close of plaintiffs' evidence, the School District moved for a directed verdict. This Motion was renewed at the close of all evidence. A verdict was returned in favor of Petitioners. The School District moved for Judgment notwithstanding the verdict, which was denied.

The School District appealed the Entry of Judgment in favor of Petitioners. Specifically, the School District contended that there was no "State action" in the events of June, 1984, that Epps was not acting "under color of law" in June, 1984, that the School District did not have a policy of deliberate indifference or reckless disregard of Petitioners' rights in connection with its investigation of the rumors circulated regarding Epps in the fall of 1981, and that any policy of the School District was not the "moving force" behind the events of June, 1984. The United States Court of Appeals for the Tenth Circuit

agreed and reversed the Judgment of the trial court, holding it was error not to direct a verdict in favor of the School District or to grant its Motion for Judgment notwithstanding the verdict. *D.T. v. Independent School District*, 894 F.2d 1176, 1192-1194 (10th Cir. 1990). Petitioners did not seek a rehearing from the appellate Court, but instead applied to this Court for Certiorari.

REASONS FOR DENYING WRIT

I

WHETHER A VIOLATION OF SUBSTANTIVE DUE PROCESS ARISES FROM A SEXUAL ASSAULT BY A TEACHER OCCURRING IN CONNECTION WITH STUDENTS' VOLUNTARY PARTICIPATION IN A PRIVATELY SPONSORED ACTIVITY ON PRIVATE PROPERTY DURING SUMMER VACATION, WHEN AN EARLIER INVESTIGATION BY LOCAL SCHOOL OFFICIALS COULD NOT SUBSTANTIATE RUMORS OF SEXUAL MISCONDUCT (BUT DID NOT UNCOVER A TEN YEAR OLD CONVICTION IN ANOTHER STATE ANTEDATING THE PERPETRATOR'S TEACHING CAREER IN BOTH STATES)?

Contrary to the claim of Petitioners, this case does *not* "involv[e] child abuse in the public schools with substantial government involvement . . . " Petition for Writ of Certiorari at pp. 7-8. What this case does involve are serious questions of "state action" when the injury occurs off school premises during summer vacation in connection with an activity that is not school sponsored at a time when the perpetrator owed no duties to the School District and the School District had no authority over the students. Nor is this a case where, as Petitioners

suggest, a "felon-teacher" was imposed upon "defenseless students" by an indifferent and reckless school board. Instead, only after the events of June, 1984, had led to the arrest and conviction of Epps on charges of lewd molestation, did the School District become aware of Epps' prior conviction. (Trial transcript, Vol IV, p. 566).

The investigation that was given the rumors called to the attention of the School District was both reasonable and thorough. There was little specific information which could be verified, and that which could be verified proved to be false. As noted by the Tenth Circuit:

> [W]e must hold that the evidence in this case is simply insufficient to demonstrate that the School District's policy reflected a reckless disregard or deliberate indifference to the constitutional rights of the plaintiffs violated by Epps on June 13-14, 1984. It is by hindsight that the need to make inquiries of law enforcement agencies concerning an applicant's felony record rather than relying on the fact that a teacher convicted of a felony is not entitled to have a teaching certificate in the state of Oklahoma seems clear. Nothing done or undone by Dr. Clayton or principal Daniels, however, could give rise to deliberate indifference to the constitutional rights of the plaintiffs. "If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior*." *City of St. Louis v. Praprotnik*, 485 U.S. [112,] 126, 108 S. Ct. [915,] 925 [(1988)].

894 F.2d at 1193.

Furthermore, it is misleading to claim that this case involves "a compelling state interest in preventing abuse

in schools." *See* Petition for Writ of Certiorari at 8. The abuse did not occur in school.

The opinion handed down by the Tenth Circuit Court of Appeals is not in any way inconsistent with prior opinions of this Court or with opinions handed down by other Courts. Although Petitioners assert an inconsistency on page 8 of their Petition for Writ of Certiorari, only one of their four "questions" even suggests an "inconsistency" relevant to the facts of this case:

> Are *Stoneking [v. Bradford Area School District,* 882 F.2d 720 (3rd Cir. 1989)] and *Sowers [v. Bradford Area School District,* 694 F. Supp. 125 (W.D. Pa. 1988), Aff'd without opinion, 869 F.2d 591 (3rd Cir. 1989), vacated sub. nom. *Smith v. Sowers* ___ U.S. ___, 109 S. Ct. 1634 (1989). Aff'd on remand 887 F.2d 262 (3rd Cir. 1989) cert. denied ___ U.S. ___, 110 S. Ct. 840 (1990)] in conflict with the case at bar concerning state action with the deprivations off school property?

Petition for Writ of Certiorari at 11. Petitioner's first question (whether the state has a duty as to foster homes) is entirely irrelevant to this case. Similarly, their second question (regarding any similarity between foster homes and public schools) is irrelevant as the abuse did not occur in school. Finally, petitioners' suggestion that "*Stoneking II* [is] in conflict with *DeShaney [v. Winnebago County Department of Social Services,* 489 U.S. ___, 109 S. Ct. 998 (1989)]" is not supported by argument in the Petition. In fact, Petitioners' only citations to *Stoneking II* invoke that decision as authority for their position. *See* Petition for Writ of Certiorari at 21, 24, 26. *Stoneking* is consistent with *DeShaney,* and the opinion of the Tenth

Circuit is consistent with both. As this Court stated in *DeShaney*:

> But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors. The Clause is phrased as the limitation upon the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the state itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot be fairly extended to impose an affirmative obligation on the state to insure that those interests do not come to harm through other means . . . its purpose was to protect the people from the State, not to insure that the State protected them from each other.

109 S. Ct. at 1003 (citations omitted).

> As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.

Id. at 1004. This Court also reemphasized that "the Due Process Clause of the Fourteenth Amendment, . . . as we have said many times, does not transform every tort committed by a State actor into a constitutional violation." *Id.* at 1007 (citations omitted).

The instant case does not even present a "tort committed by a State actor" because Epps was not acting "under color of law" in June, 1984. This Court has defined an action taken "under color of law" as "[m]isuse of power, possessed by virtue of state law and *made possible only because the wrong doer is clothed with the authority of state law.*" *United States v. Classic*, 313 U.S. 299,

326 (1941)(emphasis added). Epps did not misuse his power as a teacher, because he had none in June, 1984. The school year had ceased, and Epps' duties would not resume until the following August. Furthermore, taking Petitioners on a fund raising expedition and then, later, with parental permission, taking them swimming, and having them spend the night with him, were not actions "made possible only because [Epps was] clothed with the authority of State Law." Anyone could have offered to take the children to Sand Springs or Tulsa to raise funds; anyone could have offered to take the children swimming. *See Hughes v. Meyer*, 880 F.2d 967, 972 (7th Cir. 1989)(game warden is not acting "under color of law" when he does no more than any citizen could have done).

The analysis of "duty" provided by *DeShaney*, cannot support Petitioners' position.

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interest against harms inflicted by other means.

109 S. Ct. at 1006. (footnote omitted). The School District imposed absolutely no restraints upon Petitioners in June, 1984. The predicate "restraint of liberty" necessary to find an affirmative duty under *DeShaney* is totally absent in this case.

Petitioners suggest that the relevant question is how "the State *initially placed*" Petitioners. Petition for Writ of Certiorari at 12 (emphasis added). However, the School

District does not "place" anyone anywhere during summer vacation. The real issue is whether there was any exercise of state authority to force Petitioners into a situation which they were helpless to avoid. It was with their parents' permission that Petitioners accompanied Epps to Tulsa and Sand Springs to raise funds for a privately sponsored basketball camp; it was with parental permission that Petitioners accompanied Epps to Drumright to go swimming and later spent the night with him.

Petitioners suggest that they were "bonded to" Epps. Petition for Writ of Certiorari at p. 13. Despite the assertion of Petitioners, this "bonding" can only refer to precisely the sort of "special relationship" which this Court has rejected as relevant to determining whether an "affirmative duty" arises on the part of the state. *DeShaney*, 109 S. Ct. at 1004.

Petitioners admit that "the facts before this Court do not present a picture of total restraint." Petition for Writ of Certiorari at p. 14. However, the facts do not present a picture of *any* restraint. The School District did not knowingly "place a convicted sexual felon amongst these children." *See* Petition for Writ of Certiorari at 15. Epps' prior conviction was unknown until the abuse had already occurred.

Petitioners suggest that the Court impose "a narrow constitutional duty to diligently investigate notice of abuse in the schools." Petition for Writ of Certiorari at 15-16. However, that suggestion ignores the fact that there was an investigation which was both reasonable and thorough under the circumstances and given the nature of the rumors brought to the attention of the

School District. Nothing even approaching "deliberate indifference to substantial notice" occurred in the case presented to the Court. Petitioners in effect seek to hold the School District strictly liable because Epps' prior conviction was not uncovered. That failure speaks more to Epps' ability to suppress that information than to any lack of diligence by the School District. Petitioners thus seek to impose liability even without showing any negligence on the part of the School District, but even negligence is insufficient to state a cause of action under Section 1983.

In *Spann v. Tyler Independent School District*, 876 F.2d 437 (5th Cir. 1989) cert. denied ___ U.S. ___, 110 S. Ct. 847 (1990) the Fifth Circuit Court of Appeals held that a School District could not be held liable under Section 1983 for an allegedly inadequate investigation of reports of sexual abuse by a School bus driver committed during the course of his employment. Assaults on several different occasions were reported to the principal, who conducted an allegedly inadequate investigation. The facts of the instant case are even less favorable to Petitioners than those in *Spann*: Epps was not acting under color of law in June, 1984, nor was there a suggestion of previous assaults by Epps while a teacher in Terlton which were called to the attention of the School District.

Petitioners cite *Taylor by and through Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987). Petition for Writ of Certiorari at p. 16. There the state had placed a child in custody of foster parents who abused her. Here, the School District did not "place" plaintiffs in a basketball camp or in Epps' home. Petitioners quote a passage stating that "it is time that the law give to these defenseless

children at least the same protection afforded adults who are imprisoned as the result of their own misdeeds." 818 F.2d at 797. That passage is consistent with the holding in *DeShaney* that the state's affirmative duty flows from the limitations upon individual liberty imposed by the state. In the instant case, there was no imposition or compulsion by the School District depriving them of the liberty to decline to participate in a private summer basketball camp, to decline to participate in fund raising activities, to decline to accompany Epps swimming, or to decline to stay over night with Epps.

On page 16 of their Petition for Writ of Certiorari, Petitioners suggest that "restraint of personal liberty" could be found first, because attendance at school is required by law. However, the law does not require attendance at summer basketball camps, participation in fund raising activities for privately sponsored camps, accompanying private individuals swimming, or staying the night in the homes of private individuals. Secondly, Petitioners assert "the state endowed Epps with a position of trust to control the children's very decision-making process which could have avoided the abuse." Again, Epps was in no position to make decisions for the children. They were under no obligation to respect his wishes with regards to attending summer camp, raising funds for a camp, going swimming, or staying the night.

This Court contrasted attendence of children at school with the incarceration of prisoners in *Ingraham v. Wright*, 430 U.S. 651 (1977):

> Though attendance may not always be voluntary, the public school remains an open institution. Except perhaps when very young, the child

> is not physically restrained from leaving school during school hours; at the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mis-treatment.

Id. at 670. There is no reason to reconsider the *Ingraham* holding, as suggested by Petitioners on page 11 of the Petition for Writ of Certiorari. The distinction between schools and prisons is perfectly consistent with the discussion in *Deshaney* that an "affirmative duty to protect" is a function of the limitations on liberty imposed by the state. 109 S. Ct. at 1006.

In summary, the Petition for Writ of Certiorari should be denied. By no stretch of the imagination (let alone a "fair attribution") can Epps' assault be attributed to the State. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). Nothing the School District did (or did not do) deprived Petitioners of liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

II.

WHETHER A SEXUAL ASSAULT BY A TEACHER OCCURRING IN CONNECTION WITH THE VOLUNTARY PARTICIPATION BY STUDENTS IN A PRIVATELY SPONSORED ACTIVITY ON PRIVATE PROPERTY DURING SUMMER VACATION INVOLVES STATE ACTION BY THE SCHOOL DISTRICT WHEN AN EARLIER INVESTIGATION BY LOCAL SCHOOL OFFICIALS COULD NOT SUBSTANTIATE RUMORS OF SEXUAL MISCONDUCT BY THE TEACHER (BUT DID NOT UNCOVER A TEN YEAR OLD CONVICTION IN ANOTHER STATE ANTEDATING THE PERPETRATOR'S TEACHING CAREER IN BOTH STATES)?

An insurmountable obstacle to Petitioners' Section 1983 claim against the School District is the complete

absence of any "state action" in the events of June, 1984. To establish state action, "the complaining party must . . . show that 'there is a sufficiently close nexus between the State and the challenged action." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974). Petitioners' injuries were inflicted in June, 1984, at the hands of Epps. When the nature of their claim is made clear, it is revealed that Petitioners actually seek impermissibly to hold the School District liable on a respondeat superior basis. However, the School District "cannot be held liable under Section 1983 on a *respondeat superior* theory."

Monell v. Department of Social Services of the City of New York, 463 U.S. 658, 691 (1978).

> The purpose of this requirement is to assure that consitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains. The importance of this assurance is evidence when, as in this case, the complaining party seeks to hold the State liable for the actions of private parties.

Blum v. Yaretsky, 457 U.S. at 1004 (emphasis original). This Court also held "that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided some significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.* (citations omitted). In the instant case, the School District exercised no "coercive power" causing the events of June, 1984, to occur. The School District did not do anything which even remotely suggests "encouragement" of those events.

Petitioners assert without citation that the Tenth Circuit held that the School District's involvement in the events of June 13, 1984, was merely "passive." Petition for Writ of Certiorari at p. 19. The Tenth Circuit did emphasize "the necessity of finding a direct causal connection between the municipal conduct (policy) and the constitutional deprivation." 894 F.2d at 1192, citing *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 824-25 (1985). The appellate Court also required "that a consciously adopted 'policy' (here the established procedure of the School District in the investigation, hiring and supervision of teachers) must, in a causal sense, reflect deliberate indifference to the constitutional rights of [Petitioners.]" 894 F.2d at 1193.

> We hold that, as a matter of law, the evidence in the case was insufficient to establish that the School District's policy of investigating, hiring and supervising teachers was so wanting that it constituted deliberate indifference or reckless disregard for the constitutional rights of the plaintiffs.

894 F.2d at 1194. That conclusion was not error.

It is irrelevant whether the School District "placed [Epps] in a classroom and gym" and what authority Epps may have had over students in the classroom situation; the events of June, 1984, did not occur in a classroom. They did not even occur on school property, during the school year, or in connection with a school related event. Any "grant of authority" to Epps had terminated on the last day of school in the previous May. No new "grant of authority" would descend upon Epps until the following August.

It is misleading to say that the School District "*caused* notices and flyers to be sent home from school and approve the use of their facilities for summer basketball camps." Petition for Writ of Certiorari at p. 21. Students, often took home materials relating to a myriad of non-school related activities, including volunteer fire department meetings and water board meetings, as an effective means of communication in a small community. (Trial transcript, Vol. III, pp. 393-394).

Furthermore, whether the School District approved the use of facilities in connection with other summer basketball camps is irrelevant. The sole evidence in this connection focused upon a *girls'* basketball camp in Cleveland (Petitioners are all boys, and could not have attended that camp). Furthermore, the girls' camp would have already been held and over before the events of June 13, 1984. *See* Plaintiff's Trial Exhibit 4 (setting the dates for the camp as June 4 through June 8). The mere use of school facilities in connection with a camp Petitioners could not attend does not identify any action by the School District in connection with purely voluntary fund raising activities for a different privately sponsored camp, and even less with Petitioners' voluntary and permissive decision to accompany Epps swimming that afternoon and spend the night with him.

Petitioners cite *DeShaney*, where this Court concluded that the State had placed the child there in question in "no worse position than in which he would have been had it not acted at all." Petition for Writ of Certiorari at p. 20, citing *DeShaney*, 109 S. Ct. at 1006. In *DeShaney*, the state returned the child to his father's custody. In the instant case, Petitioners were not placed in Epps' care by

the state in connection with the events of June 13, 1984. Their association with him on that date was purely voluntary and by their own parents' permission. Any authority Epps had over Petitioners did not flow from the state, but from their own parents, and their own voluntary decision to accompany him.

Petitioners refer to "Judge Posner's 'snake pit' analogy . . . " Petition for Writ of Certiorari at p. 21, citing *Bowers v. DeVito*, 686 F.2d 616, 619 (7th Cir. 1982). In *Bowers*, plaintiff's decedent had been killed by an individual who had been diagnosed schizophrenic but released by physicians acting under a contract with a state mental health center. The Court upheld Judgment for the defendants, even though the perpetrator had killed another person with a knife five years prior to his most recent release.

> If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tort feasor as if it had thrown him into a snake pit. It is on this theory that state prison personnel are sometimes held liable under section 1983, for the violence of one prison inmate against another. (citation omitted). But, the defendants in this case did not place Ms. Bowers in a place or position of danger; they simply failed to adequately protect her, as a member of the public, from a dangerous man.

686 F.2d at 618. The Court noted that although plaintiff might have a claim under state tort law, she did not have one under 42 U.S.C. Section 1983 for deprivation of constitutional rights.

There is nothing even remotely analogous to the notice given to defendants in *Bowers* in the instant case. In *Bowers*, the defendants had themselves determined that the perpetrator was a schizophrenic. In the instant case, the rumors regarding Epps could not be substantiated but were in fact contradicted upon investigation. In *Bowers*, the perpetrator had previously murdered someone and had been again committed to the defendants. In the instant case, the School District had no actual knowledge of Epps' prior conviction (and, based on his Oklahoma Teachers' Certificate, had good reason to believe no prior conviction was possible). Nor did the School District have knowledge of any acts of sexual molestation committed by Epps during his tenure at the Terlton School before June, 1984. If Judgment for defendants was proper in *Bowers* (as Petitioners suggest by their citation to that case), then the necessity of Judgment in favor of the School District in the instant case cannot be disputed.

Petitioners quote *Stoneking*, 882 F.2d at 724, for the proposition that:

> The "person" alleged to have caused the underlying deprivation to the children's rights is the School District. Whether Epps was acting under color of law or was a state act, or would be material if Epps' private liability were the question. It is not. "Instead, the suit is against the School District, and they were incontestably acting under color of state law."

Petition for Writ of Certiorari at p. 21. The immediately preceding paragraph to that quoted by Petitioners states the basis for finding "state action":

> Unlike DeShaney's father, who is referred to throughout the *DeShaney* opinion as a private

> third-party, Wright was a School District employee subject to defendants' immediate control. In fact, many of Wright's interactions with Stoneking occurred in the course of his performance of his official responsibilities, such as during school-sponsored events and trips, and sometimes on school property.

Id. In contrast, Epps was not "subject to the immediate control" of the School District, nor did the assault "occur in the course of his official responsibilities." The "interactions" involved in *Stoneking* were described as follows:

> Stoneking's complaint alleged that Edward Wright, a School District employee who was the band director at Bradford High, used physical force, threats of reprisal, intimidation and coercion to sexually abuse and harass her and to force her to engage in various sexual acts beginning October, 1980, when she was a high school student, and continuing through Stoneking's sophomore, junior and senior years until her graduation in 1983, and thereafter until 1985. Defendants concede that some of these acts occurred in the band room at the high school and on trips for band functions, as well as in Wright's car and in his house while Stoneking babysat or after he gave her a music lesson.

Id. at 722. In contrast to this prolonged pattern of systematic abuse, no impropriety by Epps during his three years at Terlton School was called to the attention of the School District.

The actual holding in *Stoneking* provide an excellent contrast to the instant case demonstrating the School District's entitlement to Judgment in its favor. The Third Circuit held that Summary Judgment was properly granted to the superintendent of the School District,

because "the mere failure of supervisory officials to act or investigate cannot be the basis of liability." 882 F.2d at 730. The Court snoted that:

> Stoneking's claims against [the superintendent] amount to mere 'inaction and insensitivity' on his part. We cannot discern from the record any affirmative acts by [the superintendent] on which Stoneking can base a claim of toleration, condonation or encouragement of harassment by teachers which occurred in one of the various schools within his district.

Id. at 731 (citations omitted). In contrast, an action was allowed to go forward against the principal and assistant principal on the following basis:

> In sum, there is evidence in the record that between 1978 and 1982 [the principal and the assistant principal] received at least five complaints about sexual assaults of female students by teachers and staff members; that [the superintendent] was told about some of these complaints; that [the principal] recorded these and other allegations in a secret file at home rather than in the teachers' personnel files, which a jury could view as active concealment; that the defendants gave such teachers excellent performance evaluations, which a jury could view as communication by the defendants to the teachers that the conduct of which they were accused would not be considered to reflect negatively on them; and that [the principal and the assistant principal discouraged and/or intimidated students and parents from pursuing complaints, on one occasion by forcing a student to publicly recant her allegation.

882 F.2d at 728-729. The "five complaints" in *Stoneking* related to separate incidents of sexual abuse occurring at

the school, not, as in the instant case, vague and unverifiable rumors.

The Third Circuit was concerned that the actions of the principal and the assistant principal "amounted to a communication of condonation of the teacher's behavior." *Id.* at 731. The actions of the School District in the instant case were far superior to those of the superintendent in *Stoneking*, nevertheless, the Judgment in favor of the superintendent in *Stoneking* was held proper. The School District in the instant case did not ignore and condone ongoing sexual molestation, whereas that is exactly what the facts in *Stoneking* suggest. *See Blum v. Yaretsky*, 457 U.S. 991, 1004 (State must force or encourage private action). Petitioners are incorrect when they state that Epps was "under contract" to the School District in June, 1984, and that he received "checks in May, 1984, postdated for the summer." Petition for Writ of Certiorari at 22, 22 n. 10. The testimony was uncontradicted that Epps' contract with the School District was for 175 days of teaching and that although his checks were divided into twelve payments, the ones he received when he checked out in May were "cashable immediately." (Trial transcript, Vol. III, pp. 402-403, 468).

Petitioners allege that if Epps had "asked to take the children boating, Petitioners in turn would have been in a better position to exercise parental authority." Petition for Writ of Certiorari at p. 23. However, Petitioners were in an excellent position to exercise parental authority in connection with whether to accompany Epps swimming, or to spend the night with him at his house.

Petitioners cite *Sowers*, supra, and *Stoneking* for the proposition that "most abuse practiced takes place off school property." Petition for Writ of Certiorari at p. 24. In fact, both *Sowers* and *Stoneking* involved the same School District and the same teacher. *See* 694 F. Supp. at 126. In those cases, many acts of sexual molestation occurred during school, on school property, or in connection with school sponsored events. 882 F.2d at 722, 724, 728-729; *See also*, 694 F. Supp. at 127-128. In the instant case, Petitioners can cite to no analogous actions by Epps.

In summary, the comparison between this case and *Stoneking*, establishes that there was no state action of any form involved in the events of June, 1984. Therefore, the Petition for Writ of Certiorari should be denied.

III.

WHETHER A SCHOOL DISTRICT'S OBJECTIVELY REASONABLE INVESTIGATION OF RUMORS OF SEXUAL MISCONDUCT BY A TEACHER THAT FINDS NO SUBSTANCE TO THE RUMORS (BUT FAILS TO UNCOVER A TEN YEAR OLD CONVICTION IN ANOTHER STATE) CONSTITUTES AN UNCONSTITUTIONAL "POLICY" THAT IS THE "MOVING FORCE" BEHIND A SEXUAL ASSAULT OCCURRING IN THE COURSE OF VOLUNTARY PARTICIPATION BY STUDENTS IN A PRIVATELY SPONSORED ACTIVITY ON PRIVATE PROPERTY DURING SUMMER VACATION?

Petitioners begin their discussion under their third proposition by claiming that the Tenth Circuit held that "Petitioners must prove that responsible policy makers consciously 'decided' a policy of child abuse. This is an impossible submission, and overlooks the obvious fact

that the School District hired a sex offender." Petition for Writ of Certiorari at pp. 24-25.

The School District did not knowingly hire a sex offender; it hired an experienced teacher with good credentials. Furthermore, the Third Circuit Court of Appeals found allegations from which it might follow that the principal and assistant principal (but not the superintendent) did in fact actively condone and approve an ongoing series of sexual assaults by maintaining secret files of the incidents, discouraging reporting of other incidents, and humiliating at least one student who did attempt to complain. *Stoneking*, 882 F.2d at 728-729.

Petitioners cite *City of Canton, Ohio v. Harris*, 489 U.S. ___, 109 S. Ct. 1197 (1989). Petition for Writ of Certiorari at p. 25. There, this Court stated "that a municipality can be found liable under Section 1983 only where the municipality *itself* causes the constitutional violation at issue. *Respondeat superior* or vicarious liability will not attach under Section 1983." 109 S. Ct. at 1203 (emphasis original). At issue was an alleged deficiency in a city's training program regarding the determination of when a person in custody needed medical training.

> Moreover, for liability to attach in this circumstance, the identified deficiency in a city's training program must be closely related to the ultimate injury. Thus, in the case at hand, respondent must still prove that the deficiency in training actually caused the police officers' indifference to her medical needs . . .
>
> . . . In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a Section 1983 plaintiff will be able to point to something the

> city "could have done" to prevent the unfortunate incident.

109 S. Ct. at 1206 (citations and footnote omitted). In the instant case, there is nothing whatsoever to suggest that any alleged inadequacy in the School District's investigation of the rumors regarding Epps in any way "actually caused" Epps to commit the assaults of June, 1984. In *Stoneking*, the active suppression and discouragement of complaints of specific sexual assaults committed on school property and in connection with school sponsored events could amount to an active condonation and appeal of those assaults. Nothing of that sort happened in the instant case.

It is decidedly not "given" that there is an equivalence between Diane Kelly's phone call in August, 1981, and the events that occurred at the police station in *Canton v. Harris*. *See* Petition for Writ of Certiorari at p. 27. In *Canton v. Harris*, written policy delegated to shift commanders responsibility for determining when a prisoner required medical treatment, but "testimony also suggested that Canton shift commanders were not provided with any special training (beyond first-aid training) to make a determination as to when to summon medical care for an injured detainee." 109 S. Ct. at 1201. "Mrs. Harris' notice of deficient medical care" consisted in her behavior when she was brought to the police station, and thus consisted of events occurring in the police station and in front of police officers. In contrast, the "Notice" in the instant case consisted of unverifiable rumors. The repetition of a rumor does not endow it with greater credibility. *See* Petition for Writ of Certiorari at p. 28.

Petitioners cite *Davidson v. Cannon*, 474 U.S. 344 (1986). Petition for Writ of Certiorari at p. 28. In that case, this Court concluded that "the Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property." 474 U.S. at 347, citing *Daniels v. Williams*, 474 U.S. 327 (1986). In *Davidson*, a prisoner sent a note to prison officials informing them of a threat by another prisoner who had also previously assaulted the inmate. Later, the inmate was attacked by the prisoner who had previously threatened him. The Court held that any lack of due care on the part of prison officials to take steps to protect the inmate was not of constitutional dimension.

The instant case presents an even weaker argument for liability under Section 1983 than *Davidson*. There was no lack of due care in the original investigation into Epps' background when he was hired, or in the investigation conducted pursuant to the rumors and the phone call of Diane Kelly.

In conclusion, the investigation conducted by the School District was objectively reasonable under the circumstances and given the information upon which it was expected to act. The School District did not ignore facts that were staring them in the face. It was not consciously indifferent to a threat that was readily apparent and obvious to anyone. Instead, Epps had a deep, dark secret that he kept hidden from the School District, from his previous employers in Wann and Drumright, Oklahoma, and from the School District in Lancaster, Texas. The fact that it remained hidden for ten years speaks to Epps' criminal cunning, and not to any conscious indifference

to Petitioners' constitutional rights on the part of the School District.

CONCLUSION

WHEREFORE, premises considered, the respondent, Independent School District No. I-6 of Pawnee County, Oklahoma, prays this Court to deny Petitioners' Petition for Writ of Certiorari. The facts as developed at trial demonstrate that Petitioners do not have a claim against the School District pursuant to 42 U.S.C. Section 1983 for deprivation of constitutional rights under color of law. The injury of which Petitioners complain did not occur during the school year, but during vacation, a time when the School District had no authority over Petitioners or their parents, and when Epps had no authority as a teacher. No policy of the school district reflected conscious indifference to Petitioners' constitutional rights. Any "policy" of the School District certainly did not cause Epps to injure Petitioners in June, 1984. Therefore, for the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(4)

No. 89-1834

In The

Supreme Court of the United States

October Term, 1989

D.T., a minor, by his legally appointed guardians, M.T. and K.T., as parents and legal guardians of D.T.; F.H. Jr., a minor, by his legally appointed guardians, F.H. and L.H., as parents and legal guardians of F.H., Jr.; P.M., a minor, by his legally appointed guardian, R.T., as parent and legal guardian of P.M.,

Petitioners,

v.

INDEPENDENT SCHOOL DISTRICT NO. I-6 of Pawnee County, Oklahoma,

Respondents.

RESPONSE IN OPPOSITION TO PETITIONERS' MOTION FOR LEAVE OF THIS COURT TO AMEND PETITION FOR WRIT OF CERTIORARI TO INCLUDE SUPPLEMENTAL QUESTION ARGUED IN PETITIONER'S REPLY BRIEF

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COMES NOW the respondent, Independent School District No. I-6 of Pawnee County, Oklahoma, and in response to Petitioners' Motion for Leave of This Court to Amend Petition for Writ of Certiorari to include Supplemental Question argued in Petitioner's Reply Brief, would request this Court to deny Petitioners' motion.

Petitioners seek to amend their Petition for Writ of Certiorari to include the following question:

> SHOULD THIS COURT DEFINE MINIMUM (WRITTEN) POLICY OF SCHOOL DISTRICTS IN FUNCTIONAL CUSTODY OF CHILDREN TO PREVENT DEFENSELESS VIOLATIONS OF THEIR CONSTITUTIONALLY PROTECTED LIBERTY INTEREST?

Petitioners seek to justify this amendment on the following grounds:

> Quite simply, in trying to establish liability to compensate children for regrettable injuries, petitioners' counsel overlooked an alternative solution to the problems of preventing abuse in the public schools.

It is quite clear that petitioners are seeking to include in their Petition for Writ of Certiorari, an argument not previously advanced before this Court, or before the United States Court of Appeals for the Tenth Circuit. Petitioners request this Court to find that the Constitution of the United States mandates "a narrow duty diligently to investigate abuse." See Petitioners' Motion, p. 3; Petition for Writ of Certiorari, pp. 15-16. Apparently, petitioners are trying to amplify this allegation and convert it into an argument that the procedures of the school district are somehow constitutionally infirm. Not only is this a new argument not previously advanced to an

appellate court, petitioners specifically conceded to the Tenth Circuit Court of Appeals that an issue of this sort was not presented by this case:

> In examining the policy of inaction of the District *it is conceded that the District's inadequate hiring practices and supervision procedures were not unconstitutional on their face.*

Brief of Appellee, p. 13 (filed by Petitioners in the appeal to the United States Court of Appeals for the Tenth Circuit) (emphasis added). By that statement, petitioners specifically granted that there was no constitutional infirmity in the "hiring practices and supervision procedures" of the respondent school district. Petitioners should not be permitted at this time to advance an argument or a theory they specifically rejected in their argument before the Tenth Circuit Court of Appeals.

Additionally, petitioners' argument would impermissibly result in liability because the school district, unknowingly, hired a tort feasor. See *Monell v. Department of Social Services of the City of New York*, 436 U.S. 656, 691 (1978). Petitioners' "fault" argument is indistinguishable from one based upon policy or duty because fault would involve a breach of duty and the policy would have to implement the duty. Petitioners have conceded that there were no constitutional infirmities in the procedures of the school district regarding hiring and supervision of teachers. Therefore, there can be no breach of duty of a constitutional dimension in connection with those same procedures.

Furthermore, petitioners' Motion to Amend their Petition for Writ of Certiorari comes too late. Petitioners had almost four months from the date the opinion of the

Tenth Circuit Court of Appeals was filed until they filed their original Petition for Writ of Certiorari. Approximately an additional two months passed until respondent filed its Brief in Opposition. A month later, petitioners filed their reply, and as an after thought, included their additional Reason for Granting Writ. Their additional reason is not based upon any additional authority that was unavailable to them at the time they filed their original Petition for Writ of Certiorari. Additionally, as they admit in the previously quoted passage found on the second page of their motion, it simply did not occur to petitioners to advance this argument previously. Petitioners should not be permitted, now that briefing on the Petition for Writ of Certiorari is complete, to amend their Petition to assert an additional argument not previously asserted. At the very least, should petitioners be permitted to amend their Petition for Writ of Certiorari, the respondent school district should be given the opportunity to respond to that argument.

WHEREFORE, premises considered, respondent, Independent School District I-6 of Pawnee County, Oklahoma, prays to Court to deny Petitioners' Motion for Leave of this Court to Amend Petition for Writ of Certiorari to include Supplemental Question argued in Petitioners' Reply Brief, and furthermore, respondent prays

this Court to deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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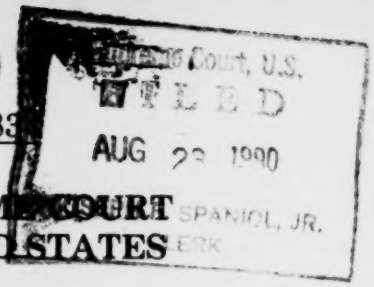

NO. 89-183

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1990

D.T., a minor, by his legally appointed guardians; M.T. and K.T. as parents and legal guardians of D.T.; F.H., Jr., a minor, by his legally appointed guardians; F.H. and L.H., as parents and legal guardians of F.H., Jr.,; P.M., a minor, by his legally appointed guardian; R.T., as parent and legal guardian of P.M.,

Petitioners

vs.

INDEPENDENT SCHOOL DISTRICT NO. I-6
of Pawnee County, Oklahoma,

Respondents

On Writ of Certiorari
to the United States Court of
Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

We will become as a nation as we educate our young. It is an awesome responsibility. One in which glaring governmental mistakes should be scrutinized by this Court. The respondent's (school district) Brief In Opposition ignores that responsibility in tone and invites Reply.

The last paragraph of the Brief In Opposition ulitmately concludes that the teacher (Epps) who committed these acts "had a deep, dark secret that he kept hidden from the School District" and the depravations "speak to Epps' criminal cunning not to any conscious indifference . . . on the part of the School District".

In reciting that sexual abuse is hard to detect, the school district has suggested further argument for review by this Court since this presents a glaring contradiction to respondent's own policy of hiring (rely on others) and their formal procedures for investigation and for detection (none). In effect, respondent would offer this Court that while "tragic" nothing can be done even when there is a felony conviction and *they are told of it.*

Petitioners submit the next question (I infra) as an additional reason for granting certiorari. It is offered as an alternative to "duty" (Question I, writ of certiorari), and it is urged that I, infra, is fairly included in petitioner's argument on "policy pursued", Question III, writ of certiorari.

ADDITIONAL REASON FOR GRANTING WRIT

I.

SHOULD THIS COURT DEFINE MINIMUM (WRITTEN) POLICY BY SCHOOL DISTRICTS IN FUNCTIONAL CUSTODY OF CHILDREN TO PREVENT DEFENSELESS VIOLATIONS OF THEIR CONSTITUTIONALLY PROTECTED LIBERTY INTERESTS?

Both sides can agree, if respondent had in place a written screening policy requesting felony information at the time Epps was hired in 1981 and a record check was conducted, there is a substantial chance that Epps would have been exposed. (Respondent has such a policy now.)

Further, when the question was brought forth as to Epps' potential to harm children by phone calls and inquiries in 1981 and 1982, (see Statement of Case, writ of certiorari), respondent had absolutely no professional procedure to investigate them.

Since *Monell vs. Department of Social Services of the City of New York,* 436 U.S. 648 (1978), this Court has balanced its supervision of municipal decision-making policies against the background of not unduly interfering with municipal autonomy. It is suggested that this supervision is needed herein.

The requirements of *Monell* mandate: 1) identifying a policy, or a conscious decision to pursue, or not to pursue, a course of action; 2) attributing fault to the municipality by proving that the policy was deliberately indifferent to constitutional rights; 3) proving that the policy was the cause-in-fact of the deprivations at issue (see II, infra); 4) identifying the final policy maker. (This has

been indirectly raised only to this Court, and is dealt with, infra III.)

The Brief In Opposition has minimized the inadequacy of the policy present under these facts. Respondent claims the "investigation . . . was both reasonable and thorough." p.8, "Reasonable" and "thorough" relative to what? An investigation without any clearly defined policy will invariably be "reasonable" because the baseline remains fluid. In essence the school district's policy is that, "it goes without saying" that we don't want abuse to occur.

Addressing this Court's latest pronouncement on "policy" and "fault", respondent invokes dicta from *City of Canton vs. Harris,* 489 U.S. ____, 109 S.Ct. 1197 (1989):

> ". . . In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a Section 1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident."

Brief In Opposition, ppg. 25-26

In *Canton,* the city *had* a policy of medical assistance for incoming prisoners. (Section 334.7). In the present facts the school district did not have any formal procedure to screen felons or investigate notice of abuse. *This is not disputed.*

Further in *Canton,* Justice White noted:

> "But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is *so obvious,* and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the city can reasonably be

said to have been deliberately indifferent to the need." (emphasis added), (footnote omitted), 109 S.Ct. at 1202.

The similarity between police departments and school districts in taking physical custody of an individual cannot be overlooked. In sheer numbers, schools exercise physical supervision over forty million children and the need for policies to prevent abuse is "so obvious" as to invoke plenary jurisdiction of this Court in discussing fault in this case.

State legislatures can pass laws empowering school districts to implement policy, but defining minimum policy in constitutional violations is for the courts. This Court took this approach in defining police policy in the use of deadly force in *Tennesee vs. Garner,* 471 U.S. 1 (1985).

With two other documented student abuse incidents resulting in teacher criminal convictions in the Northern District of Oklahoma, the problem is real. Without the Voice of this Court imposing duty or defining minimum policy, many more children will be placed by law in regrettable situations that can be prevented.

To allow school districts to continue to have a policy on abuse that "goes without saying" leaves no procedure to prevent it and no baseline to establish fault when it occurs.

ARGUMENTS IN REPLY

II.

DR. CLAYTON'S ACTUAL NOTICE OF EPPS' SODOMY CONVICTION AND CAUSATION.

Central to petitioners' case and critical to

causation is the following interchange at trial between counsel and Mrs. Diane Kelley concerning her initial phone call to Dr. Clayton on August 11, 1981.

Q. And as a result of a phone conversation that you had what did you tell Dr. Clayton you had discovered about your cousin, Stephen Epps?

A. That he had been arrested in Dallas for a similar incident. (Tr-1-44)

Respondents have continued to offer that Dr. Clayton only was told by Mrs. Kelley that Epps was fired from a teaching position. He was sure of this at trial in 1987, although at deposition in 1985 Dr. Clayton could not even remember Mrs. Kelley's name (Tr-2-118).

In fact, Dr. Clayton was told of the arrest but decided to call Glen Jones, a fellow educator, reasoning that if Epps had been arrested, Jones would know. Petitioners have been unable to find any reported cases where *a conviction was available prior to injury in a custodial situation* and have pursued this case vigorously for that reason.

Respondent counters in its Brief In Opposition at p. 1 that "there is no national clearing house to check for convictions occurring in other states." (Respondent was told that the arrest was in Dallas and it was readily available by contacting Texas law enforcement.)

Respondent indicates that they "relied upon the certification process, and did not specifically make independent inquiries regarding prior arrests or convictions". (Thereby shifting responsibility to another state agency and justifying why they believed Mrs. Kelley's information was incorrect.

Respondent hired Epps and it was their responsibility to comply with state law excluding felon-teachers.)

Respondent asserts at p. 4, Brief In Opposition, that the five other times, in 1981 and 1982, Epps' conduct was "noticed" to the School District that they reduce "to a series of unsubstantiated rumors . . ." (It is submitted that with actual notice of arrest and the abuse of Mrs. Kelley's child, prudence demands a return call to Mrs. Kelley or a felony investigation of Epps.)

The above illustrates respondent's approach of separating each piece of the puzzle to obscure the total picture. In effect by claiming, at best, they, committed errors of omission, respondent asserts that they are not the "moving force" since they didn't do any affirmative act.

Petitioners agree that "inaction" by the State presents problems to this Court in establishing causation but would show that there *is one additional operative fact present herein that is compelling.*

To illustrate, respondent argues at p. 19, Brief In Opposition, *Bowers vs. DeVito,* 686 F.2d 616 (7th Cir. 1982), for the general proposition that simply failing to do anything (inaction) to protect a member of the general public from a dangerous schizophrenic excuses the State from causation.

Petitioners' three children were not members of the general public, but were members of an identifiable class under the school district's immediate control and were forced by State law *into the physical presence of a sick teacher to be victims. As children, they never had a chance.*

This presents quite a different scenerio than *Bowers* and illustrates that action, then inaction, can establish causation and in this case a "snake pit".

III.
RESPONDENT HAS CONCEDED THAT THE SUPERINTENDENT (DR. CLAYTON) WAS THE FINAL POLICY MAKER IN THIS CASE.

The Brief In Opposition at page 13, raises a new matter in *Spann v. Tyler Independent School District*, 876 F.2d 437 (5th Cir. 1989) cert. denied ____U.S.____, 110 S. Ct. 847 (1990).

Spann involved a principal who, unknown to the school board, failed to properly investigate abuse by a school bus driver.

As an *employee*, and not a final policy maker, the Fifth Circuit ruled that this was *respondeat superior* liability and reversed.

In contrast, Dr. Clayton was the admitted final authority to establish policy in the hiring and supervision of Epps. As such, he merges into the entity of the School District and is not merely an employee.

It is uncontested by respondent that Dr. Clayton was a final policy maker, (Tr-3-422), and this distinguishes these facts from *Spann*.

IV.
RESPONDENT HAS TAKEN LIBERTIES WITH THE FACTS IN THE HEADINGS OF BOTH QUESTIONS PRESENTED I AND II, BRIEF IN OPPOSITION.

The last phrase of respondent's first two

Reasons for Denying Writ states parenthetically: "But did not uncover a ten year old conviction in another state *antedating* the perpetrator's teaching career in both states?" (emphasis added)

In fact, Epps had taught three years in Dallas at Birdy Alexander School (1968-1971), prior to his sodomy conviction, then resumed teaching at Lancaster School in August 1972 until 1977, when he moved to Oklahoma.

Respondent's own employment records indicate this, (Defendant's Exhibit 11, Proof of Teaching Experience, not introduced) and their own witness, Glen Jones, Principal Lancaster School, acknowledged this fact. (Tr-4-500)

Petitioner will not belabor this "mysterious" year absence from teaching at the time of his arrest in August 1971, only to point out that Epps was teaching in Dallas when it occurred and respondent had records of this "gap" when Mrs. Diane Kelley called Dr. Clayton in August 1981 with information on Epps' arrest and firing in Dallas.

While argument of interpretation of factual evidence is appropriate for discussion, to include a *plainly refutable fact in the Questions Presented* suggests the Trail Transcript be certified under Rule 12.5 of this Court prior to decision on this Writ.

V.
RESPONDENT'S HAVE FAILED TO OFFER ANY CONTROLLING LEGAL AUTHORITY OR PERSUASIVE FACTUAL ARGUMENT ON THE ISSUE OF STATE ACTION.

The doctrine of state action must be examined on

a case by case basis to determine whether sufficient state contact exists to submit to jury. Respondent surprisingly argues *Sowers vs. Bradford Area School District*, 694 F. Supp. 125 (W.D. Pa. 1988), (further citation omitted), which supports petitioners. (Teacher abuse of school property during the summer.)

Respondent makes the following argument on the facts, Brief In Opposition:

1) It is "irrelevant" that respondent placed Epps in a classroom and gym with authority over the children since the events did not occur in the classroom or during the school year. At p. 17. (Then where does the inquiry of state involvement begin?)

2) "*Anyone* could have offered to take the children to Tulsa to raise (basketball camp) funds." At p. 11. (Petitioners "trusted" Epps.)

3) "Students often took home materials relating to a myriad of non-school related activities, including volunteer fire department meetings and water board meetings, as an effective means of communication in a small community." At p. 18. (Notices involving basketball relate to school activities and *involve students.*)

Not once in its Brief In Opposition does respondent refer to Epps in the capacity as the children's then basketball coach.

In essence, respondent argues something which is counter-intuitive to these facts, *i.e.*, that a state officer is not a state officer. That Epps is off duty and the parents and children should know this.

Respondent has avoided the off-duty police officer analogy offered by the opinion below for good

reason. These cases are not controlling.

On point is *Stengel vs. Belcher*, 522 F.2d 438 (6th Cir. 1975), *cert. dismissed*, 429 U.S. 118 (1976). Here the court stated at 441:

> "The fact that a police officer is on or off duty, or in or out of uniform is not controlling. It is the *nature* of the act performed, not the clothing of the actor or even the status of being on duty, or off duty, which determines whether the officer acted under color of law." (emphasis added)

The "nature" of the activity which led to the injuries involved a teacher/coach taking his students/players on a basketball endeavor shortly after the school year.

The issue is an open question for this Court's review.

CONCLUSION

WHEREFORE, Petitioners have raised a new reason for granting Certiorari in I herein, and pray that a Writ issue and this Court consider the question of preventing abuse of children in the public schools and that the judgment of the Court below be reversed with instructions.

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